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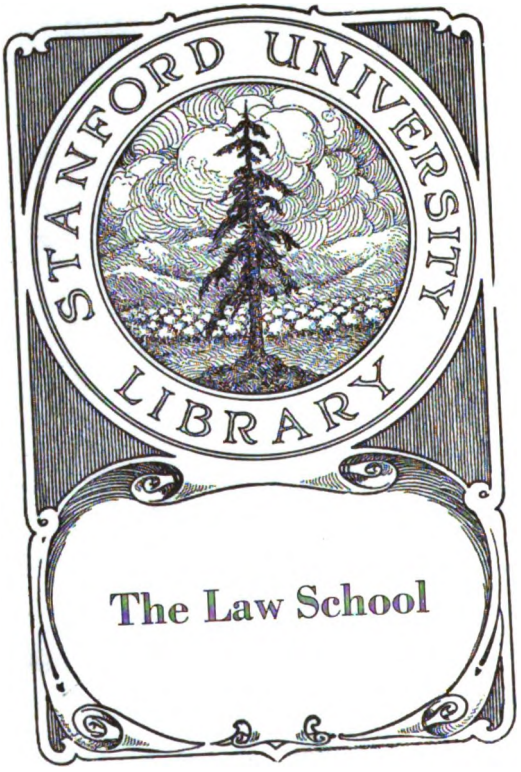

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AND

IN CHAMBERS.

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MEMORANDUM.

1903—Nov. 9.—Edward Dundas Holroyd, Esq., one of the Judges of the Supreme Court of Victoria, received the honour of knighthood.

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CASES

DETERMINED BY THE

SUPREME AND FEDERAL COURTS OF VICTORIA

Oct. 21*st*, 1903.

IN CHAMBERS.

The following memorandum is published for the information of the profession.

His Honor Mr. Justice Hood said:—

AFFIDAVITS.

"I desire to give the following intimation to the profession as to the practice I intend to adopt with reference to the use and mode of filing affidavits. Affidavits are frequently typewritten on several separate pieces of paper, and they are as a rule very loosely fastened together, and once detached there is no means of identifying them. The Prothonotary has called my attention to this practice, and I have decided to lay down this rule:—I shall not receive any affidavit written or printed on separate pieces of paper unless each page is identified by the Commissioner before whom it is sworn."

W. H. M.

tions required by the statute law and the rules of this honourable Court etc." The applicant had completed his term of articles of clerkship in February 1897, and had obtained the degree of Bachelor of Laws at the University of Melbourne at the end of the University year 1901, having during the whole of the years 1897, 1898, 1899, 1900, and 1901 attended lectures there; and

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F.C.
1903
In re EMBLING.

in October 1902 had passed the final examination for barristers and solicitors.

The Board refused to grant such certificate on the ground only that the certificate filed by the applicant, and purporting to be in the form in Schedule B. of the said rules, was not in the form or to the effect of the form in Schedule B., inasmuch as it disclosed that since February 1902 to the date of the said certificate, namely, the 10th October 1902, he had been following the occupation of an assistant master at a school.

This certificate was, so far as material to this report, as follows:—

"To the Board of Examiners.

"We certify that we have known Sidney Harold Austin Embling for nine years, during which time, as we have ascertained and believe, he has not been engaged in any trade or business (save as an assistant master in the 'The Grange' Preparatory School at South Yarra since February 1902 up to the present time), etc."

The applicant then presented a petition to His Honor the Chief Justice and their Honors the other Judges of the Supreme Court praying their Honors "to order that, notwithstanding the form of the certificate set out above, the petitioner should be at liberty to apply to the Full Court to be admitted to practice as a barrister and solicitor."

Their Honors received the petition, and directed counsel for the applicant to move the Full Court for liberty to apply as aforesaid.

Guest in support of the motion stated the facts.

[MADDEN, C.J. We desire to dispose of this matter once and for all.

A'BECKETT, J. You do not object to having the matter disposed of in this way?]

No.

[MADDEN, C.J. Is teaching a trade or business?]

The applicant felt it his duty to submit all the facts to the Board of Examiners. The latter seem to have been pressed by

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the decision of the Judges who heard the appeal in *In re Lazarus* (*a*).

PER CURIAM [MADDEN, C.J., A'BECKETT, and HOOD, JJ.] There the applicant acted as a traveller for his brother, and that was held to be distinctly a trade or business. But even in the old rigorous days, a literary occupation was always regarded as constituting no objection to admission to the profession. We think that what was done by the applicant in this case is not either against the word or the spirit of the rules, and that he may be certified to as being qualified for admission. We therefore order that the applicant be at liberty to apply at this sittings of the Full Court for admission to practise as a barrister and solicitor.

Motion allowed.

Subsequently there was presented to the Court for signature by the individual members of the Court an order to the above effect.

PER CURIAM. Application was made to this Full Court to allow Mr. Embling, notwithstanding the view of the Board of Examiners, to apply for admission at this sittings of the Court. That is the order which the Court has made, and it is an order of the Court, and does not require to be signed by the Judges at all. The Full Court has laid down the practice that it has discretion, where it thinks that no real breach of the rules has occurred, to admit an applicant to practice, notwithstanding the absence of a certificate from the Board. This is therefore an order of the Court, and is to be signed as such.

Solicitors for Embling: *Phillips & Clarke.*

H. I. C.

(*a*) [1902] Unreported.

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A'BECKETT, J.

1903
March 11, 12.

In re CHIRNSIDE.

EMMERTON *and Others v.* CHIRNSIDE *and Others.*

Will—Parent and child—Rule against double portions—Ademption of devise of land by subsequent gift inter vivos—Advancement—Wills Act 1890 (*No.* 1159).

The rule in cases of satisfaction of a portion of a legacy, that the thing given in satisfaction must be *ejusdem generis* with the thing in lieu of which it is given, applies equally to the case of ademption of a legacy by a subsequent gift *inter vivos.*

Where a person is entitled under a will to two funds either of which may be taken to have been adeemed by a subsequent gift *inter vivos*, the ademption will take effect only on that fund which the subsequent gift more nearly resembles.

A testator by his will—(*a*) devised his estate of Whiteacre to his eldest son for life with remainder to the children of such son; (*b*) devised certain lands in the counties of X. and Y. to trustees to be sold, the proceeds to be divided amongst his children 15 years after his death, or on the youngest attaining 21, the trustees being authorized at their discretion to allot shares instead of selling; both sons and daughters took absolute interests in these lands; (*c*) directed the residue of his estate to be divided between his children, the daughters being given inalienable life interests with remainders to their children. Subsequently to the making of his will testator sold part of his estate of Blackacre in the county of Z. for 17,000*l.*, and after the sale he in consideration of natural love and affection transferred the unsold portion (which was worth about the same amount), together with stock, plant, etc., to the value of about 1000*l.*, to his eldest son. The following year testator in consideration of his affection for his five daughters transferred to trustees for his five daughters inscribed stock to the value of 17,500*l.*, giving the daughters protected life interests therein with remainders to their children practically in the same way as that in which their shares in the residuary estate had been given.

Held: (*a*) That the devise of Whiteacre was not adeemed or otherwise affected by the subsequent gift of Blackacre to the eldest son. (*b*) That the devise of lands in the counties of X. and Y. was not adeemed or otherwise affected by the subsequent gift of Blackacre to the eldest son nor by the settlement of the inscribed stock in favour of testator's daughters. (*c*) That none of the daughters was entitled to share in the residuary estate without bringing her share in the settlement of inscribed stock into hotchpot.

ORIGINATING SUMMONS ADJOURNED INTO COURT.

This was an originating summons taken out by the trustees of the will and codicils of Robert Chirnside, deceased, for the determination of certain questions arising in the administration of the trusts of the said will.

The facts material to this report are sufficiently set forth in the judgment of A'Beckett, J.

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The questions for the determination of the Court were:—

(1.) Has the devise of Paradise Farm upon trust for the eldest son of the testator for his life, and after the death of such eldest son in trust for his eldest son living at his death been adeemed or affected to any, and if so to what extent and in what manner, by the conveyance, transfer, and gift of the Eurack estate stock, plant, and chattels to the defendant Robert Bell Chirnside (the said eldest son)?

(2.) Is the devise of the other real estate situate in the counties of Bourke and Grant, and the proceeds thereof upon trust for the children of the testator living at the period of distribution (with the alternatives prescribed in the will), to be treated as adeemed or affected to any, and if so to what extent and in what manner—(*a*) by the conveyance, transfer, and gift of the Eurack estate, stock, etc., to the defendant Robert Bell Chirnside? (*b*) by the declaration of trusts of the 17,500*l.* Victorian Government stock in favour of the daughters of the testator.

(3.) Is it the duty of the trustees to carry out the directions of the will with regard to the lands in the counties of Bourke and Grant, and with regard to the residuary real and personal estate, without regard to the gift of the Eurack estate, stock, etc., or to the gift of the 17,500*l.* Victorian Government stock, or how otherwise?

Higgins for the plaintiffs—The question in this case is whether the testator has, by gifts to his sons and daughters in his lifetime, brought about an ademption of certain gifts to them in his will under the rule against double portions. That rule is shortly this: when a person makes gifts by will to his children he is deemed to have intended such gifts as portions or provisions for them, and if he subsequently makes any gift to them in his lifetime, such gift *inter vivos* will, *primâ facie*, be assumed also to be a portion, and to be in anticipation and in ademption of the portions given by his will. The old cases show that this rule only applied to legacies, and not to devises of land: *Davys* v. *Boucher* (*a*). The judgment of Romer, J.,

(*a*) [1839] 3 Y. & C. Ex. 397.

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A'BECKETT, J.
1903
In re CHIRNSIDE.

however, in the modern case of *In re Lacon* (*b*) is to the contrary. This decision was overruled on appeal (*c*), but not on this point. As to the general rule, see *Robbins and Maw on Devolution of Real Estate*, p. 262.

[A'BECKETT, J., referred to *Williams on Executors* (9th ed.), pp. 1195–1197.]

No case can be found to bear out the statement of Romer, J., that the doctrine is applicable to devises of land.

[A'BECKETT, J. Even if the doctrine does apply to this case, would the widow of the testator be entitled to her annuity out of the residue if it increased as a result of such application?]

Apparently not. The only persons who are entitled under the rule are the children of the testator or persons to whom the testator stood *in loco parentis*. The whole subject of double portions has been discussed in the recent case of *In re Scott* (*d*), which follows *Taylor* v. *Taylor* (*e*).

Weigall for defendant Peter Newham Chirnside—The rule against double portions covers the present case, and should be applied. According to Bowen, L.J., in *In re Lacon* (*f*), the rule is founded on two presumptions—(1) that a gift by parent to child is intended to be by way of portion; (2) that a portion given *inter vivos* is intended to be in advancement of any portion previously given by will to the same child. Both those presumptions may, however, be rebutted, but if they are not rebutted the subsequent gift *inter vivos* will be taken to have adeemed the gift by will, as equity leans against double portions. The earlier authorities put the rule on the ground that a father making any gift to his children in his lifetime or by will must be presumed to be acting in fulfilment of the natural duty to provide for his children. Hence the first of the above presumptions. Further, it being the duty of a father to provide for his children equally, he will be presumed to have intended so to do, and not to have given any one child a double portion, hence the second presumption—that in favour of ademption.

(*b*) [1891] 2 Ch. 482, at p. 487.
(*c*) [1891] 2 Ch., at p. 492.
(*d*) [1903] 1 Ch. 1.
(*e*) [1875] L.R. 20 Eq. 155.
(*f*) [1891] 2 Ch. 497, 498.

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[A'BECKETT, J. It will be useless to apply those principles to the gift of residue here, as there is practically no residue, and therefore no shares in it to be adeemed.]

The testator must be taken to have adeemed the shares, and the children who received these gifts in his lifetime, not only in the residue, but also in the Bourke and Grant lands, may only have their shares in these lands on condition of their bringing into the residue the value of the gifts already received by them. The modern authorities tend to show that the rule raises a kind of election. The rule against double portions was formerly thought to be applicable only to gifts of money. This is no longer law: *In re Vickers* (*g*). The rule being applicable to other gifts, the value of such gifts for the purpose of ademption (which is only *pro tanto*) must be taken at the time when such gift was made. In the present case such value was asserted to testator's knowledge for the purpose of assessing stamp duty. In the older cases it was considered that the gift by will was adeemed *in toto* by the subsequent gift *inter vivos*, even though the latter were smaller in amount than the gift by will. To prevent the application of this harsh rule the Courts of Equity laid hold of small differences in the gifts as grounds for excluding the rule. But when the ademption was subsequently decided in *Pym* v. *Lockyer* (*h*) to be *pro tanto* only, the Courts gave to the rule a wider construction than theretofore. For example—a gift of residue by will was formerly held not to fall within the operation of the rule: *Davys* v. *Boucher* (*supra*). Now this is no longer the law: See *Williams on Executors* (9th ed.), 1196; *White and Tudor's Leading Cases* (6th ed.), 388. In the same way the old rule that devises of land are not affected by this rule of equity is now gone: *Re Lacon* (*i*); *Re Beddington* (*k*). The doctrine is founded on good sense, and ought not to be limited: *Snell's Equity* (11th ed.), 240. In the present case the settlement on daughters and their children is adeemed by the gift to the daughters simply: *Lewin on Trusts* (10th ed.), 465; *In re Scott* (*l*). The widow will have

(*g*) [1888] 37 Ch. D. 525.
(*h*) [1840] 5 Myl. & C. 29.
(*i*) [1891] 2 Ch. 487.
(*k*) [1900] 1 Ch. 771.
(*l*) [1903] 1 Ch. 1.

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A'BECKETT, J.
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In re CHIRNSIDE.

no interest in any fund arising from the application of this rule: *Meinertzhagen* v. *Walters* (*m*). The applicability of the rule to devises of land has been the subject of decision in Victoria: *National Trustees, etc., Co.* v. *Ward* (*n*). That was a case of advancement under the *Statute of Distributions* but the principles governing that case and advancement under the general law are the same. The value of the land or stock settled, with interest thereon from date of settlement—*Stewart* v. *Stewart* (*o*)—must be put back into the residue before the devisees can receive their respective shares under the will, including in the case of R. B. Chirnside the life estate in Paradise Farm.

Guest for the defendant R. B. Chirnside—There is no ademption. No case has been cited deciding that the rule applies to devises of land. The dictum of Romer, J., in *In re Lacon* is *obiter*, and is not borne out by the authorities. The whole question is one of intention, and the *ejusdem generis* doctrine—*i.e.*, that the gift *inter vivos* and gift by will must be substantially similar—is still law, with this modification, that small differences in the gifts will not exclude the operation of the rule. A gift of Whiteacre by will is not adeemed by a gift of Blackacre *inter vivos*. No case can be found in the books to the contrary, and the doctrine is one which should not now be extended: See *In re Lacon* (*p*); *Williams on Executors* (9th ed.), p. 1197. As to the remarks of North, J., in *In re Vickers* (*q*), the Court of Appeal has in the latest case—*In re Jaques* (*r*)—declined to adopt the view taken by that learned Judge as to the meaning of the language used by Jessel, M.R., in *In re Lawes* (*s*). The devise of the Bourke and Grant lands is a contingent devise, and affords additional reason for it not being adeemed either by the gift of the Eurack estate or of the stock on that estate. The gifts are not *ejusdem generis*, but are substantially different in their nature. As the trust for the sale of the Bourke and Grant lands is only discretionary,

(*m*) [1872] L.R. 7 Ch. 670.
(*n*) [1895] 21 V.L.R. 519; on appeal, 17 A.L.T. 309.
(*o*) [1889] 5 Ch. D. 539.
(*p*) [1891] 2 Ch. 500, per Bowen, L.J.
(*q*) 37 Ch. D. 534.
(*r*) [1902] W.N. 228.
(*s*) [1882] 20 Ch. D., at p. 88.

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the trustees may divide the land *in specie*, therefore this gift must be considered as a devise of land rather than as a gift of a sum of money to be ascertained at a future time. As to this defendant's life estate in Paradise Farm, that cannot be considered as *ejusdem generis* with the gift of Eurack or the stock thereon. It is submitted that no gift, either of realty or personalty *inter vivos* works an ademption of a devise of land by will unless there be direct extrinsic evidence of the testator's intention that the gift should so operate.

He also referred to *Chichester* v. *Coventry* (*t*).

Lewers for the defendant M. M. U. Chirnside—The doctrine of ademption by portion is anomalous at the present day, since the passing of the *Wills Act*, and should not be extended: *Re Ashton* (*u*). The presumptions which have been referred to only arise after it is shown that the gift *inter vivos* is of such a kind as might reasonably be taken to have been intended as a portion. Whether the gift is a portion or not is a question of intention. The gift of stock to the daughters was not intended to be a portion. It was intended merely as a gift of about 100*l.* per annum, as like gifts in *Taylor* v. *Taylor* (*v*); *Watson* v. *Watson* (*w*). In the latter case a gift of 60*l.* per annum was held not to be a portion. In *Ravenscroft* v. *Jones* (*x*) a gift of 400*l.* *simpliciter* was also held not to be a portion. Assuming, however, that the gift in the present case was a portion, then the second presumption has to be considered. The ademption (if any) will be of the gift of residue, and will not affect the contingent devise of the Bourke and Grant lands. *Bellasis* v. *Uthwait* (*y*); *Williams on Executors* (9th ed.), pp. 1164–1168; *Lewin on Trusts* (10th ed.), p. 467; *Holmes* v. *Holmes* (*z*). In *In re Lawes* (*a*) there was a gift of money's worth almost equivalent to a gift of money, while here the gift by will is a devise of land, which is not equivalent to a gift of a specific sum of money. *In re Beddington* (*b*) was decided on certain

(*t*) [1867] L.R. 2 H.L. 71.
(*u*) [1897] 2 Ch. 574; [1898] 1 Ch. 142.
(*v*) [1875] L.R. 20 Eq. 155.
(*w*) [1864] 33 Beav. 575.
(*x*) [1863] 32 Beav. 669.
(*y*) [1837] 1 Atk. 427.
(*z*) [1783] 1 Bro. C.C. 555.
(*a*) [1882] 20 Ch.D. 81.
(*b*) [1900] 1 Ch. 771.

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extrinsic evidence which is not set out in the report, and therefore cannot be considered as an authority for the proposition in support of which it is cited.

The gift of stock was not to the daughters, but to the daughters for life, and afterwards to their children, whereas the gift by will is to the daughters alone. The dictum of Vaughan Williams, L.J., in *In re Scott* (c), that this difference of beneficiaries makes no difference on a question of ademption is contrary to the decision in *Rose* v. *Rogers* (d). Extrinsic evidence is admissible to show all the circumstances surrounding the gift in the donor's lifetime: *Debeze* v. *Mann* (e); *Robinson* v. *Whitley* (f). It is submitted that the evidence here shows that the gift of stock was not intended to be by way of portion. The dissimilarity between the two gifts is sufficient to rebut the presumption, even if *primâ facie* this gift of stock is to be taken as a portion. *National Trustees Co.* v. *Ward* (g) is a case under the *Statute of Distributions*, and is not applicable to the present case, as under the present law all the property of the intestate has to be considered as personalty for purposes of administration and distribution, and in such a case a gift of land could be considered as working an ademption of a share on an intestacy, but in the case of a will it is submitted that it cannot.

Weigall in reply—The case of *National Trustees Co.* v. *Ward* (g) merely shows that a gift of land may be a portion, "portion" being the word used in the *Statute of Distributions*, so that case is an authority for that proposition in the present case. *Taylor* v. *Taylor* (h) was also a case under the Statute. The reason for applying the rule is the same in the case of a will and of an intestacy—namely, to produce equality of benefit among children. *Bellasis* v. *Uthwait* (i) and the other cases cited are cases of satisfaction and not ademption. They are cases of the satisfaction of a debt *inter vivos* by a gift by

(c) [1903] 1 Ch., at p. 9.
(d) [1870] 39 L.J. Ch. 791.
(e) [1787] 2 Bro. C.C. 165.
(f) [1804] 9 Vesey 577.
(g) 21 V.L.R. 519; 17 A.L.T. 309.
(h) L.R. 20 Eq. 155.
(i) 1 Atk. 427.

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will—the converse of the present case, to which different principles apply: *Williams on Executors* (9th ed.), 1195. The "portion" which is given to each of the beneficiaries in the present case is made up of all the benefits given to each of them by testator's will.

Guest (by permission)—Even if it be the case that any one gift in the will, taken by itself, may be considered as a portion, all the gifts to each person cannot be consolidated and the whole considered as that person's portion.

Higgins replied.

Cur. adv. vult.

March 24.

A'BECKETT, J., read the following judgment:—Robert Chirnside died in May 1902, leaving a widow and ten children, five sons and five daughters. His will was made in 1878, and a codicil thereto in 1898. Its provisions in favour of his children were substantially as follows:—He gave his eldest son a life estate in a property known as Paradise Farm, with remainder to his children. He devised certain lands in the counties of Bourke and Grant to his trustees, to be sold, the proceeds to be divided between his children fifteen years after his death, or when his youngest child came of age. The trustees might, at their discretion, allot shares instead of selling. Both sons and daughters took absolute interests. The residue of his estate he directed to be divided between his children, but his daughters were to take inalienable life interests, with remainders to their children. At his death Paradise Farm was valued at about 6348*l.*, the Bourke and Grant lands at 46,631*l.*, and the residue at about 29,600*l.* Debts and the widow's annuity were first charges on the residue, so that the children's interest in it is little or nothing. In 1901, the Government purchased from the testator lands which formed part of an estate known as Eurack (no part of the Grant and Bourke lands), for about 17,000*l.* The unsold part of Eurack was worth about the same amount. After the sale, the testator, in consideration of natural love and affection, conveyed and transferred the unsold part of Eurack to his eldest son, and

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gave him live stock and plant to be used with it to the value of about 1000*l.* On the 26th of March 1902, the testator, by deed of that date, expressed to be in consideration of his affection for his five daughters, transferred inscribed stock to the amount of 17,500*l.* to trustees, giving his daughters protected life interests, with remainders to their children, not in the same words but practically in the same way as that in which their shares in the residuary estate had been given.

The questions I have to consider are, whether all or any of these gifts to the eldest son and the daughters in their father's lifetime impose upon them any obligation to bring their value into account in taking their shares under the will. It is not suggested that the testator contemplated such a result. He knew how his children stood under his will, and that when he gave a large estate and a large sum of money in his lifetime to some of his children it left less for his will to divide between all after his death. He had a right to prefer in this manner, and may have had excellent reasons for doing so. The Court is not asked to disturb this preference in furtherance of any actual intention supposed to have existed in fact, but of a constructive intention, presumed by law, when certain conditions concur and bring into operation the rule against double portions. As Sir John Romilly said in *Ravenscroft* v. *Jones* (*k*):—"Equity, with a view to carrying out equality, insists on making shares equal as far as possible, although it may not appear that the testator intended it, and although there is no evidence on the subject." The same Judge, in a subsequent case, said of this rule:—"It is technical, and not to be extended. It more often defeats the intention than gives effect to it." Lord Eldon described it as a "sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature." In our own time, Lord Justice Lindley, in answering an observation in argument that the doctrine had been treated with disfavour, observed:—"We should not, perhaps, invent it in these days, but we have inherited it:" *In re Lacon* (*l*). Whatever may have been said of the doctrine, it is part of our law,

(*k*) 32 Beav., at p. 671. (*l*) [1891] 2 Ch. 482.

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and I must apply it so far as I am able to the case now before me, being careful to observe Lord Justice Bowen's precaution "not to introduce any subtle or frivolous distinction in dealing with the rule," and being also careful not to extend it. One of its attendant dangers is that it allows parol evidence to be given of what a testator said as to gifts in question. Thousands of pounds may depend upon the turn given to a casual observation. Unscrupulous persons, making affidavits as to what a dead man said, might with impunity distort, suppress, or invent. I have affidavits now before me as to statements by the testator which I accept without doubt as entirely trustworthy. They do not appear to assist either side. Neither side relied upon them.

Coming now to apply the law to the facts before me, I have reached some conclusions without any difficuly. I hold that the gifts to the children of shares in the Bourke and Grant lands may be regarded as portions within the rule; that the gifts of shares in the residue may be so regarded; that the gifts of shares in the 17,500*l.* to the five daughters may also be so regarded, and that the settlement of these shares would not necessarily prevent them from adeeming absolute interests. As to the conveyance of Eurack lands, the advantages conferred on the donee were of such a kind as to constitute a portion so far as land can constitute a portion upon which the rule will operate. A conveyance of land may be an advancement under the *Statute of Distributions*—see *National Trustees* v. *Ward* (*m*)—but the Statute expressly refers to a child having "an estate by settlement" and having "land by settlement," so that cases on the *Statute of Distributions* are no authorities upon the point I am now considering. I shall hereafter state my reasons for holding that the Eurack lands are not a portion within the rule. The live stock and chattels I hold not to be a portion; they were comparatively trifling gifts, incidental to the gift of Eurack. If the value of Eurack were to be brought into account, their value might perhaps be added to it, but alone they do not constitute a portion.

It has been contended, on behalf of the children who have not benefited by the gifts *inter vivos*, that the value of Eurack,

(*m*) 21 V.L.R. 519.

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as well as the shares in the settled 17,500*l.*, should be brought into hotchpot, or otherwise accounted for as a condition to participating in the division of the Grant and Bourke lands and of the residue. As to the Eurack lands, it is to be remembered that one of the conditions to ademption is that the legacy and the gift which adeems it must be *ejusdem generis*. Bowen, L.J., says in *Lacon's Case*—"When there is a substantial and material difference between the gifts *inter vivos* and the gifts under the will, the Courts have abstained from treating the former as an advancement." Considerable latitude has prevailed in applying the *ejusdem generis* rule, and things not apparently near akin have been considered near enough for the rule to apply. But land and money have never been treated as so assimilated. There is distinct authority against it. In *Bellasis* v. *Uthwait* (*n*) it is laid down that the thing given in satisfaction must be of the same nature as the thing in lieu of which it is given; land is not to be taken in satisfaction for money nor money for land. In *Grave* v. *Earl of Salisbury* (*o*), the *ejusdem generis* requirement is insisted on as excluding land. It is true that these were cases of satisfaction of a portion by a legacy, not of double portions, but for the present purpose I think the same principle must govern. In *Berkton* v. *Barton* (*p*), where the rule as to double portions was applied to a residue, Lord Romilly applied it expressly on the authority of *Thynne* v. *Earl of Glengall* (*q*), which was a case of satisfaction of portion by legacy. Similar reference to *Thynne's Case*, as an authority in cases of double portions, recognizing the analogy between those cases and cases of satisfaction of a covenant by bequest, will be found in *Montefiore* v. *Guedalla* (*r*). The cases of *Davis* v. *Boucher* (*s*), overruled on another point, decides that any advance by gift of land will not cause ademption. I have been referred to a case of *In re Jaques* (*t*), in which advances for the purchase of land were held to be no ademption. It may decide the point to be considered here as I decide it, but

(*n*) 1 Atk. 427.
(*o*) [1785] 1 Bro. C.C. 426.
(*p*) [1859] 27 Beav. 106.
(*q*) [1848] 2 H.L C. 131.
(*r*) [1859] 1 De G.F. & J., at p. 101.
(*s*) 3 Y. & C. 397.
(*t*) [1902] W.N. 228

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from the short note the ground of decision is not clear. Apart from authority, so many important distinctions exist between a gift of a sum of money and a gift of land that I think it would be a decided extension of the rule to apply it to land.

I now come to the gift of inscribed stock, which presents far more difficulty. As to this, we must look at the will to see what gift in the will the gift of the inscribed stock may fairly be held to adeem. The will has two gifts, two portions. Are both, or is one, and which one, to be adeemed? The Bourke and Grant lands portion differs widely from the residue portion. The first is, as to its subject, certain specified lands. These lands may be actually divided between the beneficiaries, instead of being sold. The beneficiaries might be called devisees rather than legatees. If so regarded, they would not be within the rule, but I will treat them as legatees. Then, as to the way in which the gift is to be enjoyed, the daughters take absolute interests in the Bourke and Grant lands portion. As to the residue portion, not only does it differ in being a share of an unascertained mixed product of real and personal estate, but in the mode of enjoyment being restricted to inalienable life interests to the daughters, with remainders to their children. When I asked which of these two widely different portions should be considered as adeemed, counsel for the younger sons answered that the two gifts in the will should be amalgamated, and the product of the two should be treated as the one portion of which the gift of inscribed stock was a *pro tanto* ademption. The residue is worth little. Counsel worked out his scheme thus:—When the daughters' shares in the Bourke and Grant lands are to be given, the trustees must deduct from them what the daughters have received in inscribed stock. Those deductions will form a fund to augment the residue divisible in equal shares between the ten children. This is ingenious, and reasonable if the rule against double portions is to have its restrictions relaxed and its aim of equality attained without any strict regard to the character of the presumptions on which it is founded.

Speaking generally, the law says—"You find a father giving something by his will; you find him afterwards giving something of the same kind to the same child *inter vivos*. You are

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therefore to conclude that he is giving in advance some part of that which would otherwise have reached the donee through the will. A prospective gift is anticipated. If the things given are essentially different, there is no ademption." I think that it would be an unwarrantable extension of the rule to treat as one portion two such dissimilar gifts as the share in Bourke and Grant lands and the share in the residue, and to say, as to the gift of inscribed stock, that it was an advancement of part of the portion constituted by the amalgamation of a share in the lands with a share in the residue. This would be straining the legal presumption. It is artificial in its simplest form, but presumes a conceivable intention. On the other hand, an intention to advance a mixed amount partly in respect of ascertained lands and partly in respect of an unascertained residue, partly in respect of an absolute interest and partly in respect of a settled share, with no standard by which to fix the proportions of deduction as between the two gifts, is to me an inconceivable intention. Once arrive at the position that, on the question of advancement, you have to say which gift in the will is anticipated, the similarity of the trusts of the residue with the trusts of the inscribed stock, and the fact that the inscribed stock was the proceeds of sale of what formed part of the residue, conclusively show that the advancement is to be taken as an advancement in respect of the residue.

In *Montefiore* v. *Guedalla* (*u*), Haim Guedalla was entitled, under his father's will, to a legacy of 3000*l.*, and also to one-third of the residue, which was given upon trust for the benefit of him and his children. After the date of the will, on the son's marriage, the father transferred to trustees 2000*l.* bank annuities, which were settled upon certain trusts for the son, his wife and children. A question arose as to whether this gift of 2000*l.* bank annuities should be treated as an ademption of the 3000*l.* legacy, or of the share in the residue. Campbell, L.C., said:—"The trusts respecting the 2000*l.* advanced on marriage are not exactly the same as the trust respecting his one-third of the residue, but they do not by any means vary so far as to prevent ademption. There remains the question whether the ademption

(*u*) 1 De G. F. & J., p. 93.

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shall be from the residue or from the legacy of 3000*l.* Instead of ademption, it should more properly be called substitution of an advance by the testator in his lifetime, instead of payment by his executors. Then for what shall the advance on Haim's marriage be considered as substituted *pro tanto*? I say that which it most nearly resembles. But the advance and the residue were almost homogeneous, the trusts being substantially the same for the benefit of Haim and his children. On the contrary, the legacy of 3000*l.* was an absolute gift to Haim, which he was to receive for his own exclusive benefit." Turner, L.J., says:—"There being then in this case two funds, either of which may be taken to have been adeemed by the settlement, the remaining question is on which of these funds the ademption is to take effect." He agrees with the Lord Chancellor, guided partly by the provisions of the will as to other advances being deducted from residue, but also by what he describes as "the proximate correspondence between the trusts of the settlement and the trusts declared by the will of the share of the residue."

This authority supports the view I have taken, that if the gift of the inscribed stock raises a case for ademption, as I hold it to do, the ademption can only take place with respect to the shares in the residue. According to the statements before me as to the value of the residue, there will be so little to divide that the shares in the inscribed stock will probably never be brought into hotchpot, and the four younger sons will not benefit by the rule against double portions.

I answer the questions asked by the summons as follows:—

1. No. (It has not been seriously contended that a devise of one estate can be affected by the conveyance to the devisee of another estate by the testator in his lifetime.)

2. Neither by (*a*) nor by (*b*).

3. None of the daughters of the testator will be entitled to share in the residuary real and personal estate of the testator without bringing her share under the settlement into hotchpot. No similar obligation attaches to R. B. Chirnside with respect to the Eurack estate and chattels.

As to costs, I direct those of all parties to be taxed as between solicitor and client. It would be unfair to the widow,

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the person having the first charge on the residue, to diminish her fund by paying out of it the costs of litigation from which she could have derived no benefit. I direct the trustees to retain and pay them out of the accumulated or current rents of the Bourke and Grant lands. Liberty to apply.

Solicitor for the plaintiffs: *Emmerton.*
Solicitor for R. B. Chirnside: *Hamer.*
Solicitor for M. M. U. Chirnside: *Sumner Martin.*
Solicitors for P. N. Chirnside: *Dobson & Weigall.*

J. M.

HOOD, J.
1903
May 6.

TURNER *v.* SYKES.

Vegetation Diseases Act 1896 (*No.* 1432), *ss.* 2, 17—*Vegetation Diseases Act* 1901 (*No.* 1773), *ss.* 2, 3—*Exposing for sale diseased vegetables—Inspector appointed to "carry into effect the provisions of the Act"—Authority to prosecute—Informer—Right to prosecute for an offence against an Act for public protection —"Disease" within meaning of Vegetation Diseases Acts—Proclamation in Government Gazette of 3rd December* 1902—*Validity of proclamation.*

Semble, an inspector appointed under sec. 17 of the *Vegetation Diseases Act* 1896 to "carry into effect the provisions of this Act" is thereby empowered to prosecute offenders against that Act or the Act No. 1773 amending it.

The said Acts being for the protection of the public at large, any person may prosecute for an offence against them.

Sargood v. *Veale* ([1891] 17 V.L.R. 660) applied.

In pursuance of the powers conferred on the Governor in Council by the *Vegetation Diseases Act* 1896 to proclaim any disease to be a disease under the Act, a proclamation of 3rd December 1902 was issued declaring "every abnormal condition of or in any tree plant or vegetable . . . . whether consisting of the presence of or caused by or due to the operations development growth or decay of any insect," etc., to be a disease.

Held, that the proclamation, though if read literally it might be *ultra vires*, was to be construed in connection with the Act, and was valid.

ORDER TO REVIEW.

The defendant, Charles Sykes, was charged, on the information of James Godden Turner, an inspector under the *Vegetation Diseases Act* 1896, with "exposing for sale diseased vegetables to wit pears contrary to the provisions of the Acts in that case made and provided." The information came on for hearing before the Court of Petty Sessions at South Melbourne, when

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evidence was given for the prosecution that a large percentage of a case of pears exposed for sale by the defendant had been attacked by the codlin moth. No evidence was called on behalf of the defendant. The information was dismissed, on the ground that "there had been no disease declared by the Governor in Council under the *Vegetation Diseases Acts*."

The proclamation of 3rd December 1902, referred to in argument, sufficiently appears in the judgment of Hood, J. (*infra*).

Cussen for the informant to move the order absolute.

McCay for the defendant to show cause—(1.) The informant had no authority to lay the information. The *Vegetation Diseases Act* 1896 (No. 1432) gives no such authority, probably for the reason that the Act related merely to the growing and importation of vegetables, etc. *Cf.* secs. 7, 9, 13 (*f*), and 17, and the *Government Gazette* of 25th September 1896, at p. 3981, where the duties of inspectors are set out. The *Vegetation Diseases Act* 1901 (No. 1773) extended the provisions of both Acts to the selling of vegetables, etc., but no extension of the inspectors' duties was made. An inspector, therefore, has merely such authority as he would have at common law. Sec. 3 of the Act No. 1773, under which the information was laid, provides for a pecuniary penalty only. In order to maintain his prosecution the informant must have a pecuniary interest in the penalty: See *Bradlaugh* v. *Clarke* (*a*); *Regina* v. *Panton, Ex parte Schuh* (*b*); and *Boyce* v. *O'Hehir* (*c*). The informant has no such interest.

[*Cussen* referred to *Crampton* v. *Buller* (*d*) and *Sargood* v. *Veale* (*e*), where it was held that "an information for an offence against an enactment for the benefit of the public at large may in general be laid by anyone independently of any authority from the party or parties to whom the penalties to be recovered are to be awarded by law."]

(2.) Sec. 3 of the Act No. 1432 defines "disease" to mean "any *disease* affecting trees etc. and which the Governor in

(*a*) [1883] 8 A.C. 354, 358.
(*b*) [1888] 14 V.L.R. 529.
(*c*) 14 V.L.R. 532.
(*d*) [1897] 22 V.L.R. 663.
(*e*) [1891] 17 V.L.R. 660.

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Council may . . . . by proclamation . . . . declare to be a disease . . . . and whether or not caused by or consisting of the presence of insects or fungus." It has been held that, in addition to being a disease in fact, it must be proclaimed a disease: *Cock* v. *Lascelles* (unreported), per Williams, J., 13th August 1902. Similarly in the case of an "insect." The codlin moth has been proclaimed an insect: See *Government Gazette*, 4th June 1902, p. 1984. The proclamation of 3rd December 1902 is *ultra vires*, in that it includes things which are not diseases within the meaning of the Act. It is therefore wholly invalid.

Cussen in reply was stopped as to the first point.

(2) The proclamation of 3rd December 1902 should be construed by reference to the Act under which it is made, and therefore as dealing only with diseases under that Act. To that extent it is perfectly valid. If possible the Court will always uphold proclamations, etc., and not declare them void: See *Lumley on By-Laws*, p. 268.

HOOD, J. With regard to the first point raised, namely, "that the informant had no authority to lay the information," even apart from the decision in *Sargood* v. *Veale* (*f*) I should be inclined to say that the inspector had the right to prosecute. He is to be appointed, according to sec. 17 of the *Vegetation Diseases Act* 1896, "for carrying into effect the provisions of this Act." If he is to be appointed for those purposes, one of them would be to prosecute offenders against the Act. He is therefore entitled to prosecute.

Apart from that, it is clear that the *Vegetation Diseases Act* 1896, and the Act No. 1773 amending it, are for the protection of the public, and the offence alleged is an offence against the public; and therefore, on the authority of *Sargood* v. *Veale* (*g*), any person may prosecute.

On the second point, I think that the magistrates were wrong in their decision with regard to it. The point is

(*f*) 17 V.L.R. 660. (*g*) 17 V.L.R. 660.

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as to the effect of the proclamation of the Governor in Council of 3rd December 1902. The Governor in Council has power under the *Vegetation Diseases Act* 1896 to proclaim any disease to be a disease under the Act. What he has done is to declare that "every abnormal condition of or in any tree or plant or vegetable . . . . whether consisting of the presence of or caused by or due to the operations development growth or decay of any insect or fungus at any time heretofore proclaimed" shall be a disease within the meaning of and for the purposes of the Acts. Reading those words literally, counsel is right on this point. They would include abnormal conditions which are not diseases. But I think that this document, like every other such document, is to be construed in connection with the subject-matter of the Act to which it relates, and is also, if possible, to be construed so as to make it prevail. That can easily be done in this case by reading the words as "every abnormal condition which is a disease," which would make the proclamation perfectly valid.

As to the third point raised, all that it is necessary to say about it is that there is evidence upon which the justices might have convicted if they had thought fit. The defendant, however, has a right to answer that evidence, and the matter will therefore be remitted. The defendant will have to pay the costs of the order to review.

Order absolute, with costs. Case remitted.

Solicitor for the informant: *Guinness*, Crown Solicitor.
Solicitors for the defendant: *McCay & Thwaites.*

H. I. C.

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F.C.

1903
February 6, 10.

REX v. MACKNEY.

Criminal law—Crimes Act 1891 (*No.* 1231), *s.* 17—*Abduction with intent to unlawfully and carnally know—Materiality of girl's willingness—Misdirection.*

The prisoner was presented under sec. 17 of the *Crimes Act* 1891 for unlawfully taking a girl under the age of eighteen years out of the possession and against the will of her mother, with intent that she should be unlawfully and carnally known by him.

The presiding Judge directed the jury "that the girl's willingness to go with the accused was immaterial, and that the section was meant to preserve the parents' control over a girl who was still under their control, whatever the girl's disposition was," and reserved the question whether his direction was right.

Held, that the direction was insufficient, and new trial ordered.

Reg. v. *Biswell* ([1847] 2 Cox C.C. 279) and *Reg.* v. *Mankleton* ([1853] Dearsley C.C. 159) disapproved of.

Reg. v. *Henkers* ([1886] 16 Cox C.C. 257) and *Reg.* v. *Olifier* ([1866] 10 Cox C.C. 402) approved and followed.

SPECIAL CASE.

This was a special case on points reserved for the opinion of the Full Court by Madden, C.J.

The parts of the case material to this report were as follow:—

The prisoner was charged at the Central Criminal Court, December sittings, on presentment, with unlawfully taking Kate Flynn, a girl under the age of 18 years, to wit of the age of 17 years, out of the possession and against the will of her mother, with the intent that she the said Kate Flynn should be unlawfully and carnally known by him the said Edward Mackney. The presentment accompanies this case.

The charge was laid under sec. 17 of the *Crimes Act* (No. 1231).

The jury convicted the prisoner.

The evidence showed without dispute—

1. That prior to the 11th October 1902 the girl Kate Flynn, who was 17 years of age in October 1902, had been all her life and was at the date first mentioned still living with her mother.

2. That Kate Flynn was employed at a boot factory at wages, and that she gave all her wages to her mother, who allowed her what she thought fit for pocket money.

3. That the prisoner, who was a married man, living with his

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wife at Northcote, was a friend of Mrs. Flynn and her family and that they visited one another's houses, and that Kate Flynn used to go as a visitor to the prisoner's house, and the prisoner was accustomed to see her home.

4. That in the course of these opportunities the prisoner had seduced Kate Flynn before the 11th October 1902, and they were accustomed to have frequent sexual intercourse while abroad together.

5. That the prisoner had made several arrangements with Kate Flynn that he and she should go away together, but the doing so was put off by the girl; but, in particular, an arrangement was made between them that they should go away on the afternoon of the 11th October.

6. That on that day, at a little before noon, the prisoner called at the factory where Kate Flynn was employed, and sent her a message as from her mother. That she went down expecting to see her mother, and that the prisoner "bundled her" into a cab which he had there, and they drove in it to a dressmaker's, where he had previously ordered a dress for her, which dress they obtained. They then proceeded to some baths, which Kate Flynn said she could not identify, and there changed their dress. They then lunched together at some place which the girl said she did not know. They then went to the Queen's Wharf in the cab, and the prisoner put the girl on the steamer for Geelong. He himself stood on the opposite side of the street until the boat was starting, when he too came on board and gave the girl a wedding ring, and they left in the steamer for Geelong.

7. That they arrived at Geelong, and went in a cab to a boarding-house. The prisoner there asked for a double room "for himself and his wife," which was provided, and he and Kate Flynn occupied that room as man and wife thenceforward to the 11th November 1902, with the intermission of only one night, when the prisoner had gone to Melbourne. The prisoner paid for the fares to Geelong, and for the board and lodging of himself and of Kate Flynn.

8. That Mrs. Flynn, the mother of Kate, saw the prisoner on the 17th October at his own house at Northcote, and reproached him for taking the girl away, and asked him to tell her where

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she was. Prisoner refused, saying she would not come. Mrs. Flynn urged him to tell her where the girl was, and she herself would go and fetch her. The prisoner refused, saying that if the mother got her back she would put her in a convent.

The mother saw the prisoner again the next morning, and again urged prisoner to fetch the girl home. He refused, and said—"If you don't keep quiet, you will never see her." The girl was ultimately discovered by the police at Geelong on the 11th November, and was arrested, as the prisoner was too.

9. The girl asserted that she had never intended to go away with the prisoner, though she had promised to do so; and that he succeeded in getting her away by bringing her downstairs on the 11th October by a false message, and then bundling her into his cab; and that she did not know where he had taken her after he had got the dress from the dressmaker till they got to the Queen's Wharf, and that the whole removal, transport, and detention of her was against her will.

In my opinion the whole evidence showed that the scheme was designed, provided, and paid for by the prisoner, who was certainly the moving spirit of it; but that the girl was willing to go with him, and that she might, if she had been unwilling, have got away and returned home; and the jury added to their verdict of guilty an expression of opinion that "the girl fully consented to go."

Counsel for the prisoner asked for a direction on two grounds—(1) That there was no evidence of a "taking of the girl out of the possession" of her mother within the meaning of the statute; and (2) the evidence showed that the prisoner did not take the girl to Geelong "with intent to unlawfully and carnally know her" within the meaning of the statute.

Counsel relied for his first point on the apocryphal words of Baron Bramwell, alleged by counsel in *Reg.* v. *Henkers* (*a*) to have been used by that learned Judge, and on the decision of the Common Sergeant in the case mentioned. I thought that *Reg.* v. *Biswell* (*b*) and *Reg.* v. *Mankleton* (*c*) were distinct authorities against the point, and were of better authority than *Reg.* v.

(*a*) 16 Cox C.C. 257. (*b*) 2 Cox C.C. 279.
(*c*) Dearsley C.C. 159.

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Henkers; and that *Reg.* v. *Jenkins* (*d*) seemed to support *Reg.* v. *Biswell* and *Reg.* v. *Mankleton*, and disposed of the second point decided by *Reg.* v. *Henkers*.

The authority of Sir James Stephen, too, in *Stephen's Criminal Law* (3rd ed.), p. 193, as to the meaning of the words in question was, I thought, important.

I refused to direct the jury, and I left the case to them, but as counsel was urgent that I should state a case for the opinion of the Court, as these points were the only defence, I consented to state one, though feeling that the difficulty, if any, was very slight. I told the jury that the girl's willingness to go with the prisoner was immaterial; that the section was meant to preserve the parent's control over a girl who was still under their control, whatever the girl's disposition was.

I also told the jury that there was evidence from which they might conclude that the prisoner took the girl out of the possession of her mother, and against her will, with intent to carnally know the girl.

The question for the Court is, was I right in my direction?

JOHN MADDEN, C.J.

Isaacs, K.C. (with him *Maxwell*) for the accused—To constitute the offence described in sec. 17, there must be an intention, not merely to carnally know, but to unlawfully and carnally know. Merely to carnally know a girl under 18 is not an unlawful act. To carnally know a person within the prohibited degrees of affinity is to unlawfully and carnally know her. If the offence aimed at by sec. 17 is constituted by merely "taking, etc., with intent to carnally know," then either no meaning is given to the word "unlawfully," or the Court would be holding that a person might have an intention to commit a crime, where if he carried out the intention he actually has the crime would not be constituted. In any case the direction of the Chief Justice, according to his own statement of it, is quite insufficient, for the jury might have inferred from it that the mere fact that the girl went away

(*d*) [1895] 21 V.L.R. 113.

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with the prisoner was sufficient to convict him of "taking her out of the possession, etc." The real point is this—that if the prisoner were charged with the substantive offence—namely, that of unlawfully carnally knowing—he must have been acquitted even if he had carried out his intent. How can it be contended that he could be convicted of an intent to do that for which, if he had actually done it, he could not have been convicted?

He referred to *Reg.* v. *Henkers* (*e*); *Reg.* v. *Olifier* (*f*); *Reg.* v. *Jenkins* (*g*); *Hayes* v. *Stevenson* (*h*); *Reg.* v. *Prince* (*i*); *Reg.* v. *Robb* (*k*); *Reg.* v. *Booth* (*l*).

Gurner for the Crown was heard only as to the question whether the direction was right—Sec. 17 itself brands this as an unlawful act, though it does not fix the penalty for it.

He referred to *Reg* v. *Blythe* (*m*).

Cur. adv. vult.

February 10.

WILLIAMS, J., read the judgment of the Court [WILLIAMS, HOLROYD, and HODGES, JJ.]

WILLIAMS, J. The point we have to consider in this case is not the point taken at the trial by counsel for the prisoner, that there was no evidence of a taking of the girl out of the possession of her mother, but whether the Chief Justice rightly directed the jury as to what would constitute a taking of the girl by the prisoner under sec. 17 of the Act 1231. Counsel apparently, from the authorities he cited, contended that the mere fact that the girl went away with the prisoner was not sufficient, *per se*, to establish a taking of the girl out of the possession of her mother by the prisoner. His contention apparently was that there must be a display of some activity on the prisoner's part; that he must have done something by way of inducement or persuasion, or must have in some way conduced to the girl's leaving her home, as by inducement,

(*e*) 16 Cox C.C. 257.
(*f*) 10 Cox C.C. 402.
(*g*) 21 V.L.R. 113.
(*h*) [1861] 25 J.P. 39.
(*i*) [1875] L.R. 2 C.C.R. 154, at p. 174.
(*k*) [1864] 4 F. & F. 59.
(*l*) [1872] 12 Cox C.C. 231.
(*m*) 1 Cox C.C.

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persuasion, blandishment, or artifice. The Chief Justice evidently did not agree with this contention, for he disregarded the authorities cited, and decided to follow certain other authorities which were in conflict with those cited. This is shown by the paragraph in the special case which states:—"Counsel relied for his point on the apocryphal words of Baron Bramwell, alleged by counsel in *Reg.* v. *Henkers* (*n*) to have been used by that learned Judge, and on the decision of the Common Sergeant in the case mentioned. I thought that *Regina* v. *Biswell* (*o*) and *Regina* v. *Mankleton* (*p*) were distinct authorities against the point, and were of better authority than *Reg.* v. *Henkers*, and that *Reg.* v. *Jenkins* (*q*) seemed to support *Reg.* v. *Biswell* and *Reg.* v. *Mankleton.*"

It is clear, therefore, that in directing the jury as to what constituted a taking away under the Statute, the Chief Justice followed *Reg.* v. *Biswell* and *Reg.* v. *Mankleton*, and declined to follow the law upon this point as stated in *Reg.* v. *Henkers.* The question, therefore, which we really have to decide is this: Is the law upon this point as stated in *Reg.* v. *Henkers* right, or the law as stated in *Reg.* v. *Biswell*? If *Reg.* v. *Henkers* be sound law, the direction of the Chief Justice was wrong; if *Reg* v. *Biswell* be sound, the decision of the Chief Justice was right. It is not correct to say that the words of Baron Bramwell, cited in *Reg.* v. *Henkers*, are apocryphal, as the report of Baron Bramwell's pronouncement on this point will be found in *Reg.* v. *Olifier* (*r*). These two authorities—*Reg.* v. *Olifier* and *Reg.* v. *Henkers*—are later in date than *Reg.* v. *Biswell* and *Reg.* v. *Mankleton*, and are strongly supported by two other authorities not cited before the Chief Justice—*Reg.* v. *Robb* (*s*) and *Reg.* v. *Booth* (*t*). See also *Archbold's Criminal Practice* (22nd ed.), p. 860. Therefore, not only are the more recent authorities opposed to the view taken by the Chief Justice, but those authorities numerically outweigh the two followed by the Chief Justice, and are approved of in the latest

(*n*) 16 Cox C.C., p. 257.
(*o*) 2 Cox C.C. 279.
(*p*) Dearsley C.C. 159.
(*q*) 21 V.L.R., p. 113.
(*r*) 10 Cox C.C. 402.
(*s*) 4 F. & F., p. 59.
(*t*) 12 Cox C.C., p. 231.

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editions by writers upon this point. We think that the law is correctly stated in the later decisions, and that *Reg.* v. *Biswell* and *Reg.* v. *Mankleton* are bad law. Unfortunately the Chief Justice followed these two authorities, therefore his direction was not correct, and there must be a new trial. It will be noted that we carefully abstain from saying that there was not sufficient evidence to support the conviction had the jury been properly directed. Referring to a statement contained in paragraph 9 of the special case, we desire to add that, had the Chief Justice directed the jury that if in their opinion the scheme was designed, provided, and paid for by the prisoner, and that he was the moving spirit, in our opinion that direction would have been quite right and in accordance with the later authorities, and had the jury come to that conclusion the girl's willingness would have been quite immaterial.

Conviction quashed. New trial ordered.

Solicitor for prisoner: *Waxman.*
Solicitor for the Crown: *Guinness*, Crown Solicitor.

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1903
April 2.

REX *v.* PATRICK CRAIG.

Criminal law—Letter demanding money with menaces—Reasonable and probable cause—Opinion and belief of the prisoner—Crimes Act 1890 (*No.* 1079), *s.* 113.

The words "without any reasonable and probable cause" in sec. 113 of the *Crimes Act* 1890 apply to the demand of money, etc.

Reg v. *Hamilton* ([1843] 1 C. & K. 212) followed.

To entitle a prisoner to be acquitted on a charge, under sec. 113 of the *Crimes Act* 1890, of "sending a letter demanding money with menaces and without any reasonable and probable cause," the jury should find that there was in their opinion reasonable and probable cause for the demand, and that the prisoner honestly believed that there was a proper demand.

Reg. v. *John Chalmers* ([1867] 10 Cox. C.C. 450) followed.

The Queen v. *Nathalie Miard* ([1844] 1 Cox. C.C. 22) not followed.

CASE RESERVED by the Court of General Sessions.

1. Patrick Craig was convicted of sending to his father, William Craig, a letter demanding money with menaces and

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without any reasonable and probable cause, under sec. 113 of the *Crimes Act* 1890.

2. [The letter was set out.]

3. Patrick Craig is 45 years of age, and up to the age of 23 years had made advances to his father amounting to about 300*l.*

4. At the age of 23 he ceased to make advances to his father, and left his father's home, and was then on good terms with his father.

5. On one occasion subsequently, but more than 20 years ago, he, when he was said to be ill, wrote to his father from Adelaide for money, and his father sent him 10*l.*

6. The next demand he made for money is contained in the letter set out in the second paragraph of this case. At the trial it was admitted by his counsel that Patrick Craig wrote that letter; but it was contended that he had "reasonable and probable cause" for sending the letter and making the demands which it contained, and that, if the jury were of opinion that the prisoner really believed that he had a good claim against his father, the prisoner was entitled to an acquittal, no matter how unfounded that belief might be in the opinion of the jury.

7. The jury retired to consider their verdict, and after a time returned into Court and put to the Court the following question, which they had reduced into writing:—

> "If the jury agree that the accused considered he had a claim for money against his father, must a verdict of not guilty be brought in?"

I answered "No," and told the jury that the question for them upon this point was whether, in their opinion, and not in the opinion of the prisoner, there was "reasonable and probable cause" for making the claim.

The jury retired, and subsequently brought in a verdict of guilty.

Mr. Horwitz thereupon, as counsel for the prisoner, asked me to state a case under sec. 481 of the *Crimes Act* 1890 upon this point.

I consented to postpone judgment until this question should be determined by the Supreme Court, and to let the prisoner

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out on bail in the manner prescribed by the 481st section of the *Crimes Act* 1890.

E. B. HAMILTON, J.P.,
Chairman of the Court of General Sessions at Hamilton.

Sanderson for the prisoner—The answer of the learned Judge was wrong, as the English decisions on an identical section show. *Regina* v. *Hamilton* (*a*) shows that "the words 'without reasonable and probable cause' apply to the money demanded, and not to the accusation threatened to be made."

[PER CURIAM. We do not think there is any doubt upon that point.]

The Queen v. *Nathalie Miard* (*b*) shows that "the words 'reasonable and probable cause' must be taken to apply to the state of the prisoner's mind at the time of making the demand, and the jury must look at all the circumstances for the purpose of deciding whether at that time the prisoner *bonâ fide* believed that she had reasonable cause." If the jury had to decide whether in their opinion there was reasonable and probable cause, they might have to determine questions as to the liability and propriety of the claim.

Counsel also referred to *Archbold's Criminal Practice* (22nd ed.), p. 502.

O'Hara Wood for the Crown—*Miard's Case* (*c*) is of no authority. It is not very clearly reported, and the evidence on which the question was left to the jury is not stated. *Cf. Russell on Crimes and Misdemeanours* (6th ed.), vol. iii., p. 716, and *Reg.* v. *John Chalmers* (*d*), in which the charge of Kelly, C.B., to the jury was wholly at variance with that in *Miard's Case* (*e*), and, on appeal, the conviction was affirmed.

(He was stopped.)

WILLIAMS, J., delivered the judgment of the Court [WILLIAMS, A'BECKETT, and HODGES, JJ.] We think that the learned Judge answered the question put by the jury correctly. The jury asked—"If the jury agree that the accused considered

(*a*) 1 C. & K. 212.
(*b*) 1 Cox C.C. 22.
(*c*) 1 Cox C.C. 22.
(*d*) 10 Cox C.C. 450.
(*e*) 1 Cox C.C. 22.

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he had a claim for money against his father, must a verdict of not guilty be brought in?" and he answered "No; you must find whether in your opinion, and not in the opinion of the prisoner, there was 'reasonable and probable cause' for making the claim." We think that is right. Reading the section, apart from authority, we feel perfectly clear that it is right. The only doubt raised is by the case of *The Queen* v. *Nathalie Miard* (*f*), where Tindal, C.J., appears to have directed the jury that it was sufficient if the prisoner truly and honestly believed that she had reasonable and probable cause for the demand. He says:—"This is the view which I recommend you to take: Ask yourselves the question whether this demand was made at a time when the party making it really and honestly believed that she had good and probable cause for so doing." But there is a much later case, *Reg.* v. *John Chalmers* (*g*), in which, in a charge of the same kind, Kelly, C.B., directed the jury in these words:—"I left it to the jury to consider whether the meaning and effect of those letters was to demand a sum of money of the prosecutor . . . . and also whether there was any reasonable or probable cause for the demand of the money, or for any of the charges and imputations implied in the letters." He left it to the jury in the broadest possible way—in fact, he left it exactly in the words of the section as to whether there was any reasonable and probable cause for demanding the money. It seems to us, on the other hand, that Tindal, C.J., did not leave it to the jury in the words of the section. We think that to entitle a prisoner to be acquitted on a charge of this kind, the jury should find that there was, in their opinion, reasonable and probable cause for the demand, and that the prisoner honestly believed that there was a proper demand.

Conviction affirmed.

Solicitor for the prosecution: *Guinness*, Crown Solicitor.
Solicitor for the prisoner: *Horwitz.*

H. I. C.

(*f*) 1 Cox C.C. 22. (*g*) 10 Cox C.C. 450.

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F.C.

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September
24, 25, 26, 29.
1903
April
2, 28, 29, 30.

VINNICOMBE *v.* MACGREGOR.

Water—Natural flow of surface water—Servitude of lower land—Obstruction of flow of water by owner of lower land—Alteration of natural features of land—Concentration of water on to lower land — Leave and licence — Licensee of Crown lands, power of, to create an easement.

The owner of land on a lower level has no right to obstruct the natural and accustomed course of the superabundant water flowing from and out of a well-defined watercourse, so as to throw such waters back on to the land on the higher level, to the damage of the owner of such higher land.

So held by WILLIAMS and HODGES, JJ. (A'BECKETT, J., dissenting).

Per HODGES, J. The same rule is applicable where the flow of water is ordinary natural surface water.

But where the natural features of the land have been so altered by drains constructed by a municipal authority, and drainage and other work done by or under the supervision of the owner of the land on the higher level, or by his predecessor in title, and such alteration has concentrated the flow of water beyond its ordinary natural dimensions on to the lower land, the owner of such lower land may protect himself by damming back such concentrated flow on to the higher land.

So held by the Full Court (WILLIAMS, A'BECKETT, and HODGES, JJ.), reversing the judgment of Madden, C.J. (28 V.L.R. 144).

A licensee of Crown lands may by leave and licence given to the owner of adjoining land exclude himself or his successor in title from claiming a right to the continuance of the natural flow of water from his land over such adjoining land.

So held by WILLIAMS and HODGES, JJ., reversing the judgment of Madden, C.J. ([1902] 28 V.L.R. 144).

APPEAL from the judgment of Madden, C.J. (*a*).

This was an appeal from the judgment of Madden, C.J. The facts are set out in the former report. When the appeal came on for argument, it was suggested by the Court that counsel should first argue the questions of law apart from the appeal upon certain questions of fact. This was done, and judgment was reserved and delivered in April 1903 upon such points of law. Subsequently a further argument took place upon questions of fact, and upon the application of the principles of law defined by the Full Court to such facts. The arguments fully appear from the judgments.

Isaacs, K.C., and *Cussen* for the appellant.

Mitchell (with him *Bryant*) for the respondent.

(*a*) 28 V.L.R. 144.

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The following cases were referred to in the argument:— *Walker* v. *The New Mexico Railway Co.* (*b*); *Barclay* v. *Wilcox* (*c*); *Rex* v. *Trafford* (*d*); *Chasemore* v. *Richards* (*e*); *Nield* v. *London and N. W. Railway Co.* (*f*); *Menzies* v. *Breadalbane* (*g*); *Smith* v. *Kenrick* (*h*); *Rylands* v. *Fletcher* (*i*); *Wilson* v. *Waddell* (*k*); *Ostrem* v. *Sills* (*l*); *Baird* v. *Williamson* (*m*); *Lyons* v. *Winter* (*n*); *Box* v. *Jubb* (*o*); *Bryant* v. *Lefever* (*p*); *Jordeson* v. *Sutton, etc., Gas Co.* (*q*); *Popplewell* v. *Hodkinson* (*r*); *Acton* v. *Blundell* (*s*); *Rex* v. *Pagham Commissioners* (*t*); *Hurdman* v. *North-Eastern Railway Co.* (*u*); *Bickett* v. *Morris* (*v*); *Macomber* v. *Godfrey* (*w*); *Byrne* v. *Minneapolis Railway Co.* (*x*); *Chicago* v. *Emmert* (*y*); *Mansford* v. *Ross* (*z*); *Holker* v. *Poritt* (*a*); *Scots Mines Co.* v. *Leadhill Mines Co.* (*b*); *Liggins* v. *Inge* (*c*); *Brett* v. *Slater* (*d*); *Willmott* v. *Barber* (*e*); *Perry* v. *Fitzhowe* (*f*); *Booth* v. *Alcock* (*g*); *Beddington* v. *Atlee* (*h*); *Lorenz* v. *Heffernan* (*i*); *Wisbey* v. *Churchman* (*k*); *Wheaton* v. *Maple & Co.* (*l*); *Shury* v. *Piggot* (*m*); *Davis* v. *Marshall* (*n*); *Cairo, etc., Co.* v. *Stevens* (*o*); *Aitken* v. *Bates* (*p*).

Cur. adv. vult.

WILLIAMS, J., read the following judgment:—At the outset I may be allowed to express my admiration of the monumental

(*b*) [1897] 165 U.S. Rep. 593.
(*c*) [1881] 86 N.Y. Rep. 141.
(*d*) [1831] 1 B. & Ad. 874.
(*e*) [1859] 7 H.L.C. 349.
(*f*) [1874] L.R. 10 Ex. 4.
(*g*) [1828] 3 Bligh H. of L. 421.
(*h*) [1849] 7 C.B. 566.
(*i*) [1868] L.R. 3 H.L. 330.
(*k*) [1876] 2 App. Cas., p. 98.
(*l*) [1897] 24 Ontario Ap. Rep. 526.
(*m*) [1863] 15 C.B. N.S. 376.
(*n*) [1899] 25 V.L.R. 464.
(*o*) [1879] 4 Ex. D. 76.
(*p*) [1879] 4 C.P.D. 172.
(*q*) [1899] 2 Ch., p. 243.
(*r*) [1869] L.R. 4 Ex. 248.
(*s*) [1843] 12 M. & W. 324.
(*t*) [1828] 8 B. & C. 360.
(*u*) [1878] 3 C.P.D. 178.
(*v*) [1866] L.R. 1 Sc. & D. App. 47.
(*w*) [1871] 108 Mass. Rep. 219.
(*x*) [1888] 8 Am. State Rep. 668.
(*y*) [1895] 68 Am. Rep. 602.
(*z*) [1885] 5 L.R. N.Z. 33.
(*a*) [1873] L.R. 8 Ex. 107.
(*b*) [1859] 34 L.T. 34.
(*c*) [1831] 7 Bing. 682.
(*d*) [1888] 14 V.L.R. 77.
(*e*) [1880] 15 Ch. D., p. 105.
(*f*) [1846] 8 Q.B. 757.
(*g*) [1873] L.R. 8 Ch. 663.
(*h*) [1887] 35 Ch. D., p. 327.
(*i*) [1877] 3 V.L.R. (L.) 129.
(*k*) [1884] 10 V.L.R. (E.) 214.
(*l*) [1893] 3 Ch. 48.
(*m*) [1625] 3 Bulst. 339.
(*n*) [1861] 10 C.B. N.S. 697.
(*o*) [1881] 38 Am. Rep. 139.
(*p*) [1870] 1 A.J.R. 163.

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industry manifested in the judgment of the Chief Justice in this case, and my appreciation of the very great assistance the labours of the Chief Justice have been to this Court.

Both the plaintiff's and the defendant's lands originally formed part of what was known as the Koo-wee-rup Swamp, but, having been reclaimed by drainage, have been tilled and cultivated. The plaintiff's land lies to the north of the defendant's land, and is on a higher level, the defendant's land being separated from the plaintiff's land by a public road. Along the south side of this road defendant, with the consent of the shire of Berwick, constructed a drain running east and west, and with the soil excavated from this drain constructed an embankment on the south side of the drain; much of this embankment was constructed on the defendant's land. The effect of this embankment, during periods of heavy rain, is to throw the water, which flows over the plaintiff's land from north to south or from north-east to south-west, back on to the plaintiff's land, allotments 65A and 95. This water, if unobstructed, would have gradually found its way down in a southerly direction into the waters of Western Port Bay. The Chief Justice, who by personal inspection made a very careful examination of the whole *locus in quo*, has found as a fact that, during these periods of heavy rains, the bulk of this water issued from the Deep Creek, and that the natural course of this water was over the plaintiff's land in a southerly and south-westerly direction, thence over the defendant's land, and thence downwards to Western Port Bay. He has also found that, in the like periods, a considerable body of water came from a point more northerly than the Deep Creek, and that some of the water was ordinary surface water, but that all had the natural course already indicated.

Under these circumstances, the first question which arises is this—Is the defendant at liberty to protect his own land, which is, as I have said, on a lower level than that of the plaintiff's, from the invasion of this water, if the effect of his measures of protection be to throw the water back on to the plaintiff's land, allotments 65A and 95? I do not think that the defendant has

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this right. He certainly has the right to protect his own land from the invasion of these waters, provided that in so doing he does not cause injury to his neighbour's land. In other words, in my opinion, the maxim, *sic utere tuo ut alienum non laedas*, applies to this case. All the water to which I have referred had an accustomed and natural course of flow; its progress was indeed slow and gradual, but it had a flow by a natural and accustomed course, and in a natural and accustomed direction. The bulk of this water issued from the Deep Creek, which was a natural and well-defined watercourse, and its superabundant waters in times of heavy rains always found their way across the plaintiff's land, and thence southwards on to and over the defendant's land towards and into the waters of Western Port Bay, *until* their flow and course were impeded by the contrivances which defendant constructed to protect his own land. This natural course or flow of these waters defendant had, in my opinion, no right to obstruct, to the damage of his northerly neighbour, the plaintiff. Having regard to the facts as found by the Chief Justice, it is not necessary for me to consider the larger question whether the defendant is bound to take or is at liberty to obstruct the flow on his land of ordinary natural surface water flowing over the plaintiff's land, for it is beyond question that the great bulk of this water was the superabundant water which issued from that well-defined watercourse known as the Deep Creek. Regarding the case, therefore, from this aspect, defendant had, in my opinion, no right, in any event, to obstruct the natural and accustomed flow or course of this water so as to cause damage to the plaintiff, though in forming this opinion I do not, and cannot, regard the course which the water took after it issued from the Deep Creek as possessing any of the elements or characteristics of a watercourse, or as capable of being considered in any respect as a watercourse.

If the facts be as I understand the Chief Justice to have found them, is the view that I have taken supported by authority? Though the relative rights and liabilities of the superior and inferior heritors of adjoining land, so far as regards ordinary surface water, is certainly not clearly estab-

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lished by the common law, by the civil law it is clearly laid down that the inferior heritor has to receive and take that water, and if it were necessary for me to decide this question in this case, I should be inclined to hold that the principle of the civil law prevails, but the question I am considering is the narrower one, whether the defendant was at liberty to obstruct the natural and accustomed course of the superabundant waters flowing from and out of a well-defined watercourse—the Deep Creek—so as to throw these waters back on to the plaintiff's land to the damage of that land. On this narrow question, the cases of *Menzies* v. *Breadalbane* (*q*) and *Rex* v. *Trafford*, (*r*) decisions of the very highest authority, seem to be conclusive.

In *Menzies* v. *Breadalbane* the defendant obstructed the natural and accustomed course or flow of the superabundant or flood waters of the River Tay. These superabundant waters of the River Tay were accustomed, when the river was in flood, as often happened, to take a course over the defendant's low land to an outlet; this natural course of the flood water the defendant blocked, with the result that the flood waters were thrown on to the plaintiff's land; it was held that the defendant had no right to so obstruct the natural and accustomed course of the superabundant waters of the River Tay, and in giving judgment in that case Lord Lyndhurst said:—"The old course of a flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a new sort of waterway to the prejudice of the proprietors on the other side. This applies not only to the ordinary course of the river, but also to a flood channel." To the same effect is the case of *Rex* v. *Trafford* (*s*). In delivering judgment in that case, at p. 886, Lord Tenterden said:—"Now it has been long established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another; unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed

(*q*) 3 Bligh, House of Lords, p. 421. (*r*) 1 B. & Ad., p. 874.
(*s*) 1 B. & Ad.

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to take at particular seasons, the creation and continuance of these obstructions cannot be justified." In that case certain land-owners had erected fenders on the banks of the River Mersey to prevent the flood waters of the Mersey from taking their natural and accustomed course over their lands; the effect of this was to damage certain property of the canal-owners. It was held that the land-owners had no right to obstruct the natural and accustomed flow of the superabundant waters of the Mersey in such a way as to cause damage to the property of others.

These high authorities appear to me to decide the question to which I confine my consideration against the defendant, and in favour of the plaintiff. It is true that there are dicta of Lord Cairns in *Rylands* v. *Fletcher*, of Cresswell, J., in *Smith* v. *Kenrick*, and of Lord Blackburn, in *Wilson* v. *Waddell* (*t*), which appear to be in conflict with these authorities, but I do not think that the dicta of those very learned Judges are in conflict with either *Menzies* v. *Breadalbane* or with *Rex* v. *Trafford*. Those dicta, I think, merely mean this, that an owner of land is entitled to use and enjoy his land in an ordinary and natural way, and that, if in the natural and ordinary user of his land he has removed a natural barrier against the invasion of water, he may substitute for that natural barrier a similar barrier. That, I think, is the explanation of Lord Cairns's dictum in *Rylands* v. *Fletcher*, in which he says, in reference to the escape of an accumulation of water in the natural user of land from that land into the workings of the mine:—"The mine-owner, if he had desired to guard himself against it, might have done so by leaving, or by interposing, some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature." The same explanation is applicable to the observations of Cresswell, J., in *Smith* v. *Kenrick*, at p. 565, and to Lord Blackburn's observations in *Wilson* v. *Waddell*.

Assuming those dicta to be a correct interpretation of the law, they do not, I think, either militate against the view I have taken, or against the authorities upon which I rely. Had there

(*t*) 2 App. Cas., p. 95.

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been a natural barrier, against the invasion of water, on defendant's land, as for instance a natural ridge, and had defendant in the natural and ordinary user of his land removed this ridge, then, according to the dicta of those eminent Judges, the defendant would have been justified in substituting for that ridge another and an equivalent barrier against the invasion of his land by water. But that is not this case. In this case defendant, to protect his own land from a natural and accustomed invasion of superabundant or flood waters issuing chiefly from a watercourse, has erected an artificial barrier to dam back those waters, with the effect of throwing those waters on to the plaintiff's land. This, as I have said, he has no right to do, and therefore, if the case stood here, he would be bound to remove the embankment.

But the defendant has also set up the defence of leave and licence, and in my opinion, so far as regards allotment 95, the defendant has established this defence, but not so as regards allotment 65A. One Edward Stanlake was the plaintiff's predecessor in title to allotment 95, and he undoubtedly consented to the making of the drain on the south side of the road, the drain running east and west. He took part in the making of this drain, and assisted to make the embankment by, with others, placing the soil excavated on the south side of the drain, fashioning it into an embankment. Edward Stanlake was clearly desirous that the drain should be made, and afterwards enlarged. He assisted at the enlargement, helped to make the spoil into embankment, and continued so assisting until it was completed, and was paid and accepted wages for the work he did. It is also quite plain that the invariable mode of making drains in that part of the country is to make a bank at the side of the drain with the stuff taken out of the drain. I think, therefore, that it is quite clear that Edward Stanlake consented to the formation and enlargement of both the drain and the bank.

It has been argued that the plaintiff should not be bound by this consent of Stanlake's. But why not? The only reason I heard urged was that, when he became Stanlake's successor, he might have known nothing about the bank; but he inspected the land before he purchased, and if he did, he must have seen

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the bank, for, as the Chief Justice says, it is the most conspicuous feature in the landscape. But though, as regards allotment 95, this defence is a good answer to the plaintiff's claim, it is no answer to the plaintiff's claim as regards damage to allotment 65A. Therefore, I think that the plaintiff is entitled to have the bank reduced to whatever extent is necessary to prevent its throwing back water on to allotment 65A, and that defendant is therefore bound to that extent to remove the obstruction complained of.

I have confined my judgment to those points which have been fully argued before us, as we were informed that there are other points in the case which the parties may desire to have argued.

HODGES, J., read the following judgment:—The plaintiff is the owner of a block of land which is separated from a block owned by the defendant by a public road only. The plaintiff's land is higher than the defendant's, and as long as no artificial obstruction exists the water, which naturally flows and falls on the plaintiff's land, would flow across the highway and on to and over the defendant's, and so escape to the Western Port Bay. The defendant has constructed a drain along the highway close to his own boundary, and has thrown the soil taken out of the drain on to his own land, and so created a drain and a bank. This bank stops the water which in wet weather flows or falls on the plaintiff's land, and which, but for the obstruction of this bank, would flow on to and over the defendant's land. The plaintiff alleges that the water so arrested is dammed back on to his land, and that he thereby suffers considerable damage, and this he argues is an actionable wrong. And this raises the first question which we have to determine—(1) Is the owner of a lower tenement bound to receive surface water naturally flowing from his neighbour's higher tenement? or perhaps it would be more accurate to ask—Is the owner of lower land liable to answer in damages to the owner of higher land if the former, by obstructions on the boundary of his land, dams back the surface water that would naturally flow from the higher land to the lower land, and thereby causes damage to the owner of the

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higher tenement? It seems reasonably clear what the answer to this question would be, if it were considered on general principles only, and apart from authority.

In Victoria, all land is held under the Crown, and every title is derived from the Crown grant. The plaintiff and defendant and adjacent owners all derive their title from the same source—the Crown. In this particular district the Crown was the owner of a large area of land, with a slight fall to the sea. Suppose the Crown sold and conveyed away the higher lying land, and retained all the lower land lying along the shore, it would seem contrary to one's sense of natural justice that the Crown should be entitled, immediately after selling, to render the land that it had sold valueless by damming back all the water that naturally flowed from the land sold on to the land retained. It would be very like derogating from its own grant. Further, the purchaser would buy the land as he sees it, and as it is, with the advantages and disadvantages of its position, whatever they may be; but if the Crown can dam back the water, then it can transform advantages into disadvantages, and by its act change that position which Nature had made the best into the worst. And the fact that the Crown does not retain the lower-lying land does not seem to me to make any difference. If the Crown sold all the land in the district at a subdivisional sale, the same considerations would apply. Each purchaser buys his portion with the advantages and disadvantages of position that Nature has imposed upon his portion. Again, the water has so flowed from plaintiff's to defendant's land, not only for twenty years, not only from a time whereof the memory of man runneth not to the contrary, but from the time the earth was formed, and assumed its present shape; and if a user for twenty years should give easements—if a user from a time whereof the memory of man runneth not to the contrary should give easements—it seems to me clear that, on the principle on which the law asserts that easements exist in such cases by reason of length of user, it must assert that a natural easement or natural right exists in the other case by reason of a user for a more extended period of time.

As to the authorities, I have not been able to find the

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precise point decided in any English case. But in *Whalley* v. *Lancashire and Yorkshire Railway Co.* (*u*), Brett, M.R., at p. 136, states a proposition which appears to me to exactly fit this question. The Master of the Rolls says:—"Then we come to the case of having property with this defect, that unless you can prevent the injury which the ordinary course of Nature will bring upon it, by transferring that injury to your neighbour's property, your property must suffer the consequences of its position." If that be the accurate enunciation of a legal proposition (and Baggallay, L.J., seems to say that it is—see p. 138), it answers the question in this case, as, apart from authority, I think it ought to be answered. Applying that general proposition here, it asserts that, as the defendant is the owner of property with this defect, unless he can prevent the injury which the ordinary course of Nature (by causing the water to flow over defendant's land) will bring upon it, by transferring that injury to the plaintiff's property, his property must suffer the consequences of its position. It is, therefore, not lawful for the defendant to save or defend his property from that water which the ordinary course of Nature would bring on his property by turning that water on to the plaintiff's property. The case of *Menzies* v. *Breadalbane* (*v*), though not deciding the precise point under discussion, as the Court was there dealing with the waters of a stream and its ordinary flood waters, is referred to by Brett, M.R., not as limiting the general proposition above stated, but as illustrating that statement. Again, in *Hurdman's Case* (*w*), though the precise point was not in question, Cotton, L.J., in delivering the considered judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.), states the principle on which the Court decided that case at p. 175, in the following words:—"We are of opinion that the maxim, *sic utere tuo ut alienum non lædas*, applies to and governs the present case, and that, as the plaintiff by his statement of claim alleges that the defendants have, by artificial erections on their land, caused water to flow into the plaintiff's land in a manner in which it would not but for such erection

(*u*) 13 Q.B.D., p. 131. (*v*) 3 Bligh N.S., p. 414.
(*w*) 3 C.P.D., p. 168.

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have done, the defendants are answerable for the injury caused thereby to the plaintiff."

That precisely applies to this case. The defendant has, by an artificial erection on his land, caused water to flow into the plaintiff's land in a manner in which it would not but for such erection have done, and consequently the defendant is answerable for the injury caused thereby to the plaintiff.

Again, in the *Scotts Mines Co.* v. *Leadhill Mines Co.* (x), the Lord Chancellor says:—"It must be recollected that, without any convention, the occupier of a lower field holds it under the servitude of receiving the natural drainage from an adjoining field on a higher level."

Again, it is not disputed, and was admitted in argument before us that by the civil law, from which most of our law on this subject is derived, the defendant would be responsible for damage done to the plaintiff by this bank. So far, the reasoning and authorities seem to me clearly to show that the defendant is liable to the plaintiff for damage he has suffered from the defendant's act in erecting the bank and thereby damming back the water. But it is urged that this is contrary to *Smith* v. *Kenrick* (y); *Rylands* v. *Fletcher* (z); and *Wilson* v. *Waddell* (a). These three cases are said to establish the proposition that the owner or occupier of an inferior tenement may lawfully construct on his own land a bank to stop any water that would naturally flow from the superior down to and over the inferior tenement; that the water is a common enemy against which each occupier or owner may defend himself, even though he thereby turns the water on to another person, or dams it back on to the superior tenement. And this necessitates an examination of these three cases.

In *Smith* v. *Kenrick* the plaintiff company was the owner of a mine, and the defendant was owner of a mine on a higher level than the plaintiff's mine, and the action was brought to recover damages from the defendant for wrongfully omitting to prevent water from flowing through his mine into the mine of the plaintiff, and also for causing water to flow from his mine

(x) 34 L.T., p. 34.
(y) 7 C.B., p. 515.
(z) L.R. 3 H.L., p. 330.
(a) 2 App. Cas., p. 93.

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into the mine of the plaintiff. The only point decided was that the defendants were not liable, and therefore, so far as the point decided is concerned, it is no authority for the right to erect a bank and dam back water naturally flowing from the higher on to the lower tenement. Nor does the principle on which it is determined assert any such right. That principle is stated at p. 564:—"Treating the question as a new one, not governed by the authority of any decided case, for all those referred to are distinguishable, it would seem to be the natural right of each of the owners of two adjoining coal mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." Here no such right to erect a bank is stated. But the defendant relies on two passages in the judgment, one at p. 565—"Surely the reasonable thing is that the plaintiff should leave part of his own coal to protect his own workings against the influx of water." That passage in no way supports defendant's argument. The learned Judge there only says, in effect, that the plaintiff was under no obligation to remove the coal, and so draw off the water into his own mine. The plaintiff might have left the coal as Nature placed it, and the water would then only flow as Nature intended. It in no way asserts the right to stop water from flowing as it would naturally flow. The other passage in that judgment is at p. 566, and is in the following words:—"We think that the same principle is applicable to the present case. The water is a sort of common enemy, as was said by Lord Tenterden in *Rex* v. *The Commissioners of Sewers for Pagham Levels*, against which each man must defend himself. And this is in accordance with the civil law, by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it." The first part of this clause is so expressed that it might have lent some colour to the defendant's arguments had not the language connecting it with the next clause, and the next clause itself, made it clear that no such right to erect a

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bank existed, for it states that—"this is in accordance with the civil law, by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it." And it is a contradiction in terms to say that the land on a lower level owed a natural servitude to that on the higher in respect of receiving this water, and to say, at the same time, that it was not bound to receive this water, but might have its surface so altered as to decline to receive it.

The next case relied on is *Rylands* v. *Fletcher*. It is not the decision in this case that is relied on by the defendants, but the following words of Cairns, L.C., at p. 338:—"My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any communication of water, either on the surface or underground, and if, by the operation of the laws of Nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of Nature." The particular words relied on—"If he had desired to guard himself against it, it would have lain on him to do so by leaving, or by interposing, some barrier between his close and the close of the defendants." As I put it to counsel in the course of the argument, no one could complain of a barrier being left, that is only saying that the occupier of the inferior tenement is under no obligation to alter Nature for the benefit of the occupier of the superior tenement; as to interposing a barrier, there could be no objection so long as the barrier interposed was similar in its effects as far as water was concerned to the original soil. And I am by no means clear that the Lord Chancellor had in his mind any

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barrier of a different kind from the original soil or one absolutely impervious to water if Nature's barrier had not been. I also think a different rule might apply to these mining cases, as here by such use water in additional quantities is brought on the land, or is being sent in a concentrated form to an adjoining close, it may be in such cases that the owner of the lower land may be entitled to protect himself against such water. But that would not help defendant in the present case, or establish his general proposition. *Wilson* v. *Waddell* is relied upon, because Lord Blackburn quotes with approval the passage from the judgment of the Lord Chancellor in *Rylands* v. *Fletcher*, which I have been discussing, and therefore needs no further comment. I therefore agree with the opinion expressed by the Chief Justice in his learned and elaborate judgment, that the owner of lower land is liable to answer in damages to the owner of higher land if the former by obstructions on the boundary of his land dams back the surface water that would naturally flow from the higher to the lower land, and thereby causes damage to the owner of the higher tenement.

I have not referred to the American cases, since such cases are not of much service on subjects covered by English authority, though entitled to great consideration on other matters. Even if the plaintiff failed on this broader proposition, he would be entitled to succeed on the narrower one, that the defendant cannot, to plaintiff's detriment, dam back the ordinary flood waters of a stream, and so prevent them from flowing their ordinary and accustomed course. On this subject, I only desire to say that I entirely concur with what has been said by my brother Williams.

The defendant next contends that this bank was made pursuant to a leave and licence granted by the plaintiff's predecessor in title. Upon this, three questions arise—(1) What was it to which Edward Stanlake (plaintiff's predecessor in title) consented? (2) Was such leave and licence irrevocable? (3) Is plaintiff bound by E. Stanlake's acts?

On the first question, the dispute is as to whether Edward Stanlake only consented to the drain which defendant made on the road along his boundary, and not to the spoil from this drain

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being thrown from the drain on to defendant's land and so forming a bank there, or did he consent to and acquiesce in both being done.

1. The main facts on which defendants rely took place in 1881. The defendant's manager applied by letter to the Berwick Shire Council for leave to broaden and deepen the drain on the road separating E. Stanlake's and defendant's land. E. Stanlake attended at the meeting of the council at which that application was dealt with and supported the application. And before making the application, defendant and E. Stanlake had discussed the matter, and there is some doubt as to whether anything was said about the bank, or as to what was said about it. But this much is clear, that he consented to the making of the drain, or rather to the broadening and deepening of the existing drain. And even if there was no other consent in words, what did he mean by that consent? We should look to undisputed facts, and see what inference ought to be drawn. Having not only agreed, but being desirous in his own interest as owner of land that this drain should be broadened and deepened, he, with others, is employed to broaden and deepen the drain. He and others thereupon did broaden and deepen the drain, and E. Stanlake with his own shovel threw up the spoil from the drain into this bank, and so he, and others working with him, and making the drain that he desired to have made, made also the bank. It is true it was done under directions, but he raised no objection, and appears to have treated the throwing of the earth up into this bank as part of the making of the drain, and he took payment from the defendant for doing this. E. Stanlake was paid for throwing the spoil from the drain into this bank. Further, in the country lands in Victoria, this is the almost invariable way of making drains, and further, the drain that was being widened and deepened had been made in the same way by throwing the spoil into the bank. The inference seems to me to be almost irresistible that he consented to and acquiesced in what was being done, and what he was helping to do—the making of the drain and bank as then formed, and when it appears that for years he raised no protest, I am unable to feel any doubt that, so far as E. Stanlake was concerned, the

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defendant proved leave and licence for the making of this bank. And on this question of fact I am unable to agree in the conclusions of the Chief Justice.

2. As to whether Stanlake could revoke such licence. It is clear that if he at the time of authorizing the construction of the bank and of its construction, had been owner in fee of allotment 95, neither he nor any person making title through him could revoke such licence or require the bank to be removed. *Liggins* v. *Inge* (*b*) appears to me to cover the whole ground. There the plaintiff's father had by oral licence permitted the defendants to cut down the bank of a river and make a weir on their own land, and thereby divert water from the plaintiff's father's mill. The plaintiff derived title from his father, and wanted to determine the licence and have the banks of the river restored to their original condition, and because the defendants would not do so, brought his action. He failed in his action. Tindal, C.J., in delivering the judgment of the Court, says, at p. 694—"Upon principle, therefore, we think the licence in the present case, after it was executed, was not countermandable by the person who gave it, and consequently that the present action cannot be maintained."

It was next contended (3) that the plaintiff was not bound by E. Stanlake's acts; that in 1881 E. Stanlake had no title in fee to the land, had not a life estate in the land, had not a lease of the land, had only a licence to occupy, a licence which prevented his occupation from being a trespass, but nothing more, and that therefore what he then said and did could not bind him as occupier or owner when he subsequently acquired title, and could not bind the plaintiff, who derived his title from E. Stanlake after he had acquired a title.

Now, in 1881, E. Stanlake occupied this land (allotment 95) under a licence from the Crown, granted under the provisions of secs. 19 and 20 of the *Land Act* 1869, as amended by secs. 4 and 5 of the *Land Act* 1878. But though described in the Act as a licensee, and though his document of title was called a licence, his interest in the land was utterly different from that of one who is usually described as a licensee. For though the licence

(*b*) 7 Bingham, p. 682.

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contained provisions for certain payments and against alienation during its existence, and for making of certain improvements, etc., yet he is entitled, on proof of his compliance with the conditions of the licence at any time "within twelve months after six years from the commencement of the licence," to demand and obtain from the Government a Crown grant upon payment of 14s. per acre. In my opinion, this is an inchoate fee simple. His interest, if he performs the conditions of his licence, just as certainly grows into an estate in fee simple as does the interest of any purchaser in possession under a contract of purchase who complies with the conditions of such contract. His interest as licensee did so grow, and he conveyed it to the plaintiff, and as he bound his interest by his acts, so he bound the interest of the plaintiff, who purchased from him. As to Mr. Mitchell's contention under secs. 74 and 140 of the *Transfer of Land Act* 1890, I have nothing to add to what the Chief Justice has said.

I have only dealt with the plaintiff's claim as the owner of portion 95. He claims also as owner of portion 65A. It was contended on behalf of the defendant that if plaintiff, as the owner of portion 95, was bound by the leave or licence of E. Stanlake, he became absolutely bound, and in respect of any property howsoever acquired. On general principles such a position seems untenable, and the case of *Davies* v. *The Town Properties Investment Corporation Limited* (c) is also, I think, an answer to such contention. And so far as portion 65A is concerned, the plaintiff is entitled to recover, and the bank must be reduced to such a height as not to interfere with this piece of land.

A'BECKETT, J., read the following judgment:—The plaintiff and defendant owned lands separated by a road, described by the learned Chief Justice as parts of the north-western extremity of the great Koo-wee-rup Swamp. He says:—"It is indispensable in this case to ascertain in the first place the actual physical conditions prevailing in the locality in question, and to distinguish those which were original and natural from those which are modern and artificial, because Nature and man have

(c) [1902] 2 Ch., p. 635.

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been sustaining a vigorous and earnest conflict for the control of this territory." He has stated these conditions most fully and clearly. I adopt his conclusions, and need not repeat his graphic description, which depicts a complete transformation effected by human industry. Not only were the waters brought under control which accumulated from various lines of flow and covered the lands in flood time, but the levels of the lands were altered by clearing and burning. While those changes were in progress the defendant cut a drain and raised a bank of earth on his own land. The effect of this bank, in flood time, was to turn back water which would otherwise have run over defendant's land, and to cause it to accumulate on the plaintiff's land, where it did damage. The plaintiff sued the defendant for compensation for this injury, and for a mandatory injunction to compel the defendant to lower his bank. The learned Chief Justice found in his favour, awarded him damages, and ordered the defendant to pull down his bank. In doing so he said that the defendant's land was "a splendid testimony of immense industry and enterprise, and great outlay, and that to cause the bank to be at once removed would be disastrous to it." He postponed the issue of the injunction in view of this. I refer to the effect of the removal as illustrative of the conditions under which landholders are enabled to hold their own in the reclaimed swamp, and the effect of applying rules of law said to prevail as to lands in their normal state to lands won from the water as these have been. From his exhaustive review of authorities in the judgment, and from the language of its operative part, it appears that the learned Chief Justice decides for the plaintiff on the following grounds:—(*a*) That, according to English law, where lands of different owners adjoin the lower land is subject to an easement to receive the natural flow of the natural surface water from the higher land. (*b*) That the owner of the lower land has no right to raise any structure on his own land which will impede this flow, and that he is answerable in damages to the owner of the higher land for any injury caused by his doing so. (*c*) That the bank in question is such a structure, and has caused injury for which damages should be awarded, and that an injunction should go for its removal.

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I differ from this judgment, firstly, because I think that no such easement has been established by decided cases in England, or has been recognized by English text-writers of authority. Secondly, that if it were established, as it is in some of the American States, I doubt whether the water which does the mischief in this case is natural surface water within the meaning of the rule. And thirdly, and mainly, because I think that in the present case the defendant was entitled to do what he has done for his own protection, although his doing so might cause damage to his neighbour. That the water here was a common enemy within the principle of the cases which justify protective measures such as those complained of. Dealing in order with my reasons for differing from the learned Chief Justice, it will be seen that he adopts the statement in *Kerr on Injunctions*—"When land is so located that rain water naturally descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. If he build a wall at the upper part of his estate so as to prevent the water from descending on it, whereby the land above is damaged, there is an actionable injury."

The authorities cited for this proposition fail to support it. In no case has a plaintiff recovered for such an injury. The only warrant I can find for the assertion are certain dicta referring to the civil law. *Smith* v. *Kenrick*, the first case cited by *Kerr* in support of his proposition, was a case in which a mine-owner was held not to be liable for damage done by water which accumulated in his mine, and flowed by percolation into the mine of his neighbour. There Cresswell, J., said—"In accordance with the civil law, land on a lower level owes a natural servitude to receive, without compensation, the water naturally flowing down to it." In *Scots Hill Mines Company* v. *Leadhill Mines Company*, Lord Campbell says:—"It must be recollected that, without any convention, the occupier of a lower field holds it under the servitude of receiving the natural drainage from an adjoining field on a higher level." The latter dictum puts the obligation higher than in *Smith* v. *Kenrick*, for an obligation to receive without compensation for injury is not inconsistent with a right to prevent the injury by excluding

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the cause of it. Though these dicta are not to be disregarded, they do not seem to have met with acceptance as an authoritative statement of English law on this important subject. *Gale on Easements* does not mention such an easement, an omission certainly more significant than the statement of *Kerr* in his treatise on another branch of law. *Gould on Waters*, secs. 275, 276, and other American text-books dealing specifically with this doctrine of the civil law, say distinctly that the rule as to the easement in question is no part of the common law, and that some of the States, following the common law, decline to adopt it. Other States do adopt it avowedly from the civil law. American decisions are referred to in the text-books, which leave no doubt as to American law on the subject having been correctly expounded. I think this Court should not be the first English Court to apply the principle derived from the civil law in regulating rights between land-owners. It is hard to say where the mischief would stop of imposing this yet unrecognized obligation on owners of land. If the inferior proprietor's land is burdened with such an easement, the slightest interruption of it would be an actionable wrong, and all kinds of questions would arise as to what did or did not impede the free flow of water from the superior land. If the rule is to apply, it may seriously check the occupation of swamp lands now being largely reclaimed. It may be said that, on the other hand, the advantage of protecting the owner of the superior land from any damage caused by acts done by the owner of the inferior would balance or outweigh the disadvantages I have noticed. It seems to me, however, that the rule that each may protect himself against a common danger would work much more beneficially, and is properly applicable to the lands we are dealing with, and to other lands similarly reclaimed from wasting waters.

As to my second ground for differing from the judgment under appeal, my brother Judges consider that the point to which I refer was reserved for further argument, and I therefore omit what I had written upon that branch of the case. In what I retain I may incidentally and unavoidably touch upon matters on which this argument would have some bearing, but if I do so it is only so far as appears to me to be necessary to

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explain the views that I have formed, and without any desire to trespass upon ground which may be the subject of further argument.

I now come to my third ground for differing from the judgment, and for thinking that the defendant was acting within his rights in raising the bank. But before dealing with it, let me point out that this third ground is unnecessary if my first be good. The learned Chief Justice bases his judgment solely upon the existence of a specific easement. If this easement does not exist, some new and different ground for holding the defendant liable has to be discovered. I do not say that, because he is not liable under the doctrine derived from the civil law, he is necessarily under no other liability, but no other liability has been stated by the judgment. It has yet to be shown by those who contend that the defendant is liable. Leave the supposed easement affecting water out of consideration, and then it seems to me that water may be excluded like any other harmful thing which a land-owner protects himself against. Suppose adjoining owners of land near the coast to be subject to a common annoyance from sand blown from the beach, and one builds a wall to protect himself, can the other get an injunction to remove the wall because it causes sand to accumulate on his land which would otherwise have been blown on to the land of his neighbour? A question of this kind has to be asked and answered if the defendant's land is not subject to an easement to receive water from the plaintiff's land. In these observations I am dealing with the judgment of the Chief Justice only, and on the supposition that the defendant has not interfered with any natural stream or watercourse, as to which, as I shall afterwards show, there is a distinct finding in his favour. If he had done so, another well-recognized ground for holding him liable would have appeared.

In *Neild* v. *The London and N.W. Railway Co.* (*d*) the defendants, being threatened by an overflow of flood water from a neighbouring river, and fearing damage to their premises, erected a barricade of planks. The flood water afterwards broke in, and being penned in by the planks, the water rose until it

(*d*) 10 Exch. 4.

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flooded the plaintiff's premises. It was held that the defendants were not liable, on the ground that the water which did the mischief was not brought there by them. Baron Bramwell said: —"The flood is a common enemy, against which every man has a right to defend himself, and it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed, out of fear lest some neighbour might say, 'You have caused me an injury.' On the ground that the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes, that is, by a heavy fall of rain, and the overflowing of the river, and the configuration of the country, the defendants had the right to protect themselves against it, and the plaintiffs cannot complain although what the defendants did in so protecting themselves augmented the damage to them."

Commenting on the judgment of the Lord Chancellor in *Menzies* v. *The Earl of Breadalbane*, Baron Pigott says:—"The Lord Chancellor seems to adopt, as a proper rule of law, the principle that a man should be permitted to protect himself in this way against sudden and extraordinary casualties." So in *Smith* v. *Kenrick*, water is spoken of as a natural enemy against which each may protect himself. In *The King* v. *Commissioner of Sewers for Pagham* (*e*), the legality of erecting structures called groynes, to protect land against encroachments of the sea, came in question, the objection being that, by such erection, the sea was caused to flow with greater violence against and to injure other adjoining lands. It was held that each land-owner had a right to erect such works as were necessary for his own protection, although they might be prejudicial to others. Lord Tenterden observes—"The sea is a common enemy to all proprietors on that part of the coast. Is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I am not aware of any

(*e*) 8 B. & C. 360.

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authority or principle of law which can prevent him from so doing."

The principle of these cases seems to me to apply to the facts here. The damage of which the plaintiff complains is not of continual occurrence. It occurs only in times of heavy rains or flood, when he and his neighbours, by reason of their occupation of land which was by nature a swamp, know themselves to be subject to dangerous visitations. In *Neild* v. *The Railway Company* the flood was exceptional, not of common occurrence, but if it had been a recurring danger, and a permanent work had been erected instead of a barricade, I think that, according to the reasoning of the judgment, the defendants would all the same have been held free from liability for damage done by the water warded off. In the *Pagham Levels Case* the sea was a continuing cause. No sudden emergency called for improvised defence. The reference in *Neild* v. *The Railway Co.* to the exceptional character of the danger is, I think, to distinguish it from those cases in which a river or watercourse has become charged with an exceptional quantity of water, and persons have protected themselves to the injury of their neighbours by interfering with the banks of the river or of the watercourse. They were held liable because of this interference. With regard to rivers and watercourses the law is clear. No one has a right to change or obstruct the flow, and this rule has been applied, not only to the ordinary course of a river, but to the relieving channels by which surplus water took an occasional but defined and regular course in times of flood—breaking from the river at one point and rejoining it at another. This was the case in *Menzies* v. *The Earl of Breadalbane*. *Rex* v. *Trafford* may be explained on the same principle. The fenders which were raised by the defendants made a kind of artificial bank for the river. In argument for the plaintiff, it was said—"The defendants, by raising the banks of the river, have caused the water in time of flood to flow in a course different from that in which it would otherwise pass." Lord Tenterden speaks in his judgment of the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons—"The fenders prevented the waters from passing in the way in

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which, when occasion happened, it had been always accustomed to pass." No interference of this kind is attributed to the defendant by the judgment under appeal. The Chief Justice has considered the law as to what constitutes a watercourse, and examines and states the result of the evidence by which the plaintiff endeavoured to prove that the defendant had interfered with a watercourse, and finds, specifically—"the waters which are in question here are not the waters of a watercourse." I did not understand this conclusion of fact to be disputed. The Deep Creek, which came to an end far to the north-east of the bank, was a large contributor to the descending floods which poured upon the lands in question, but the keeping back of this flood by the defendant's bank could not, as I think, be held to be an interference with the Deep Creek, and the learned Chief Justice does not treat it as such. For these reasons, and on the authorities to which I have referred, I think that the defendant has done no more than he was entitled to do, and that judgment should be given in his favour.

The case of *Whalley* v. *The Lancashire and Yorkshire Railway Co.* (*f*) has been referred to as in favour of the plaintiff. There the railway company had raised an embankment, flood water came upon the company's land, the embankment caused it to accumulate, it endangered the embankment, and the defendants cut trenches reasonably necessary for the protection of their property, and, without negligence, the water rushed through and damaged the plaintiff's land. The defendants were held liable for this injury, on the ground that, the water having come upon their property, they were not entitled to transfer the mischief to their neighbour. In the judgment of Brett, M.R., *Neild* v. *London and N.W. Railway* and *R.* v. *Pagham Commissioners* were referred to with approval, but distinguished, the distinction being that in the case before the Court, as the water came upon the defendants' land, they could not cure the misfortune which had happened to themselves by transferring it to the plaintiff. Bagallay, J., says:—"We find the defendants in this position, they have not prevented the flow of water upon their own land; if it had remained there it might have been attended

(*f*) 13 Q.B.D. 131.

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with danger to their embankment and to the land of their neighbours." They did not leave it to take its own course, and so were answerable for the active measures which they took to get rid of it. There is nothing in any of the judgments to suggest that the defendants might not have lawfully prevented the water from flowing upon their own land, and thus averted the misfortune to themselves by keeping the water off by such means as were adopted in *Neild's Case*, even if by so doing the same damage happened as was caused by cutting the trenches. For these reasons, *Whalley's Case* does not seem to me to assist the plaintiff.

From the view I take of the law, it is unnecessary for me to enter upon the subject of leave and licence set up as one of the defences, but I may say that I concur with the Chief Justice's conclusion that no leave and licence to the making of the bank has been proved.

Further arguments subsequently to the delivery of these judgments took place on other points in the appeal, and the following judgments were delivered:—

WILLIAMS, J. In this case we have heard on a previous occasion arguments upon certain points, and the Court has delivered judgment upon them. The argument of the case has, however, proceeded upon other points upon which we had no argument before. We now propose to deal with the case having regard to the further points upon which we have heard argument and to give judgment upon the whole matter. We are not disposed to differ from the conclusions or findings of the learned Chief Justice upon the various questions of fact dealt with in his judgment, and as to which we have had considerable argument upon both sides. He has taken infinite pains with the discussion, analysis, and consideration of the various issues of fact and the evidence relating to them. There was reasonable evidence to sustain the conclusions at which he arrived, and, therefore, we see no reason to disturb his findings and conclusions upon those questions of fact. If it had been otherwise we should have had to reserve judgment. But as we accept the

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conclusions and findings upon the disputed questions of fact we do not think it necessary to delay giving judgment.

The locality in which the plaintiff's and the defendant's land is situated was originally a huge swamp or morass extending over 100,000 acres, and it seems not only from the evidence, including the photographs produced before us, but also from the conclusions of the Chief Justice, and the result of his observation, to have been what I may unduly call an abomination and desolation of localities. The Chief Justice in his judgment gives a vivid picture of this vast area. He says (His Honor read from the judgment and continued). That was, it is stated, apparently up to 1879, and so the Chief Justice has found. Before that date the defendant, who was, and is, conspicuous amongst the pioneers of that place, undertook certain works for the purpose of making a large portion of this vast area valuable and suitable for cultivation. With that laudable purpose, and with self-interest no doubt, he constructed various drains, amongst them the east drain, and, I believe I am correct in saying, the Toomuc drain. Those are drains of very great extent. He also constructed the south drain, as to which we have had most argument. By means of his exertions and industry, and at considerable expense, he has succeeded in reclaiming his land from the dismal condition which I have already described, cutting down the ti-tree, clearing off the stumps by rolling and burning, and tilling and cultivating the land, and fitting it in every way for the purpose of cultivation and production. He has not only done that as regards his own land, but the result of his industry and expense has been to greatly benefit the land of his neighbours, including that of the plaintiff. In fact, so obvious was it that the making of the south drain benefited in a most marked way the plaintiff's land that the plaintiff's predecessor in title, one Stanlake, was anxious that it should be made and assisted in the making of it, knowing the great advantage it would be to allotment 95. (His Honor read from the judgment and continued.) As I say then, not only as regards his own land but as regards that of his neighbours, including the plaintiff, the defendant by his energy, industry, and expenditure has greatly benefited it.

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The condition of things when the south drain was made was, then, as I have stated. The Toomuc drain was made in 1876, the east drain was commenced in 1876 and finished in 1879, and then at the end of 1879 the south drain was constructed, which, as I have stated, is the drain we have heard most of in this action. Now, that being the condition of the locality, there is no doubt that the south drain carried off a very large proportion of the water from the north-east which issued from the Deep Creek. Probably in times of very heavy floods it would not carry all the water, and the result probably would be that the bank of the south drain, which was on the defendant's land, would throw back some of the water upon other lands, including that of the plaintiff. I ought to have said that the bank of the south drain was made in the way all other banks in that district were made, viz., from the spoil taken out of the south drain. Stanlake assisted in making the drain and bank, and was in fact paid wages for doing so. It was constructed in exactly the same way as the council drain was constructed in later years. The council drain is shown on the plans running from north to south, and its bank was constructed by throwing out the spoil on to the west side of the drain, having the effect of protecting the plaintiff's land from the overflow from the drain. All the other drains and banks were made in the same way. Now it is said that the defendant is responsible and liable for this embankment upon the south side of the south drain throwing back water upon the plaintiff's land, and having regard to that portion of the judgment of the majority of the Court already delivered, in that condition of things that would be so. But the whole condition of that locality has been altered since, not only by the defendant, but by the plaintiff and others. Since the east drain, the Toomuc drain and the south drain were constructed by the defendant and the locality assumed the condition I have already referred to, that condition has been completely altered by works which the plaintiff, the council, and the Government have constructed, and perhaps by works constructed by others, as to which, however, we have no evidence. The council drain was constructed by the council in 1886, the extension drain was constructed by the Government in 1896, and the plaintiff's drain

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was constructed in 1899. The effect of the making of these three drains is to concentrate and bring with far greater velocity a large body of water into the south drain which the south drain was never intended to carry under those conditions of concentration and increased velocity. For all that appears in evidence it would seem that if these three drains had not been constructed allotment 65A would never have been flooded, and the water would never have reached it, but would have been carried off by the south drain. The result of these three drains is to rush the water with greater velocity and to concentrate it in the south drain, and give that drain work which it was never intended to do. If the defendant's bank had not been on the south side of the south drain, what water was brought down by those three drains would have come over the defendant's land, and he was perfectly justified in putting up or keeping up the bank in order to keep that water off his land. Therefore we think that the position taken up by the plaintiff, that the defendant had no right to construct the embankment so as to obstruct the natural flow of surface water or the natural flow of the superabundant flood waters of Deep Creek, becomes dissipated in this change of the face of the country, because it seems to be idle to talk of the natural flow of surface water, or the natural flow of the superabundant flood waters of the Deep Creek, having regard to that change. *Ex necessitate* the extension drain takes a very considerable portion of these waters out of their natural and customary course, and so, coming west, do the council drain and the plaintiff's drain. Therefore, that point in this case disappears when it is brought home to us how materially the condition of the country and its surface have been altered since the time when the south drain was constructed. We think, for the reasons I have stated, the defendant was justified in keeping up that embankment as a protection against that water which otherwise would by means of these three drains have been poured on to his land. At any rate, even assuming that that position is not correct, this is certainly not a case in which this Court would issue a mandatory injunction to compel the defendant to remove that bank. For the reasons I have stated, we think that judgment should be entered for the defendant

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with costs. The appeal will be allowed without costs, and the judgment for the plaintiff will be set aside.

A'BECKETT, J. I concur in the judgment. It is only necessary for me to add a few words to supply what, for reasons already given, I omitted from the judgment which I delivered stating the grounds on which I thought the defendant entitled to judgment. My reasons for thinking that an easement to receive the natural flow of natural surface water cannot exist as to the lands in this case are that natural conditions have been essentially changed by common consent of the proprietors. The judgment of the learned Chief Justice is based on such easement only, and uses the words natural flow and natural surface water in the injunctions by which he gives effect to his views. As to the changes which have been effected I refer to his judgment at large, to the extracts I have already made, and to the extract just read by my brother Williams. I gather from the judgment that without the extensive drainage system now in operation the lands of plaintiff and defendant would be useless for human occupation. Both parties are living under artificial conditions, by which a swamp has been converted into an area subject to only occasional invasion by injurious water, and I think that within this area the easement in question cannot exist. If the judgment of the Chief Justice were to stand, and a breach of injunction were charged, there would be no means that I can see for ascertaining whether natural flow of natural surface water had been obstructed. The difficulty of applying a test by which it could be decided whether breach of injunction had or had not been committed seems to me to support the view that no wrong of the character found by the Chief Justice has been committed.

HODGES, J. I concur in the judgments that have been delivered, and desire to add a very few general observations. This action was brought by the plaintiff to recover damages he alleges he has sustained by reason of the defendant having obstructed the natural flow of surface water. The plaintiff contends that the defendant's land is subject to servitude, and is

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bound to receive all water that naturally would flow from the plaintiff's land on to and over the defendant's land. As a general proposition the judgments previously delivered have already dealt with that. We have now to see whether the existing conditions make that proposition applicable. It is only necessary to look at the plan and to bear in mind some of the evidence to see how utterly the natural conditions have been transformed. The water that came down the Deep Creek naturally passed over allotments 94 and 95, and in times of high flood some of it went southward to the west of the neck, and some of it southward to the east of the neck. Those waters have to a large extent been intercepted by the extension drain, which is capable of discharging 30,000 gallons a minute, just at the corner of the defendant's land. The defendant had, in my opinion, an absolute right to stop that water coming on to his land. To the west of that another drain has been mainly constructed apparently for the protection of the plaintiff's land, and capable of discharging at one point against the defendant's land 3000 gallons per minute. The defendant is absolutely entitled to stop that water from coming on to his land, and his only obligation is to stop it; he is under no obligation to see where it goes. The plaintiff also has constructed a drain capable of discharging 3000 gallons per minute at one point against the defendant's land. That also the defendant is entitled to stop. All these drains are crossing what originally was the natural flow of the surface water, and it is almost impossible to understand now how one can speak of the natural flow of the surface water originally when its conditions have been so transformed. In my opinion those three drains are bearing a large volume of water which the defendant is entitled to shut off his land. When those waters are shut off they will go on to the plaintiff's land and will probably interfere with what remains of the flow of the Deep Creek waters which would be coming over that land. It is those waters which are shut off from the defendant's land which are interfering with the natural flow of water on the plaintiff's land, and those waters the defendant is entitled to stop, and they must go where they can. The injury the plaintiff complains of

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is done by the persons who are discharging, so to speak, those waters on to his land. What water is discharged by the extension drain is discharged on to the plaintiff's land by the Government; what water is discharged by the council drain is discharged by the council on to the plaintiff's land, and what water is discharged by the plaintiff's drain is discharged by the plaintiff on to his own land. For these reasons I think now we cannot speak of the natural flow of surface water. The natural flow has gone; it has ceased to exist, because in the interests of everybody, and of the plaintiff himself amongst others, the plaintiff and other men have been doing everything they can to alter and change the natural conditions and the natural situation. Under these circumstances I think the defendant is entitled to keep his bank and defend his land, and I think judgment should be entered for him.

WILLIAMS, J. The appeal will be allowed without costs. Judgment will be entered for the defendant, with costs, and the 138*l.* paid by the defendant to the plaintiff to be repaid to the defendant.

Appeal allowed.

Solicitors for appellant: *Williams & Matthews.*
Solicitors for respondent: *Madden & Butler.* W. H. M.

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MELBOURNE AND METROPOLITAN BOARD OF WORKS *v.* SPENCER *and Another.*

Sewerage rates—Melbourne and Metropolitan Board of Works Act 1897 (*No.* 1491), *ss.* 8, 11, 12 — *Municipal valuation a condition precedent to rate — Local Government Act* 1890 (*No.* 1112), *s.* 274—*Amendment of municipal valuation—Notice of appeal against municipal valuation—Effect of abandonment of claim to rate after.*

The provisions of sec. 8 (5) of the *Melbourne and Metropolitan Board of Works Act* 1897, that for the purpose of making any rate the Board shall adopt as the net annual value of the properties the municipal valuation in force at the time of making the rate, makes the existence of such a municipal valuation of any property sought to be rated a condition precedent to the rating of such property by the Board.

Where a municipal council, claiming to rate certain property, makes a valuation of such property, and, after the owner has duly given notice of

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appeal against such valuation, abandons the claim to rate the property, such abandonment has the same effect as an adjudication by the Court to which the appeal is made reducing the valuation of the property to *nil*.

Attorney-General v. *Shire of Hampden* ([1876] 2 V.L.R. (E.) 138) distinguished.

Quære, whether the Melbourne and Metropolitan Board of Works can, under the Act No. 1491, recover rates as for "sewered property" unless the property in respect of which the rates are levied "abuts" on a sewered street.

ACTION.

This was an action in which the Melbourne and Metropolitan Board of Works sought to recover from the defendant, Walter Baldwin Spencer, a Professor of the defendant University, certain sewerage rates alleged to be due to the plaintiff in respect of property occupied by the defendant Spencer, and owned by the University.

By sec. 8 of the *Melbourne and Metropolitan Board of Works Act* 1897 (No. 1491) it is provided that—(1) the Board may from time to time, but not oftener than once in every year, cause an estimate to be prepared of the money required for one year (for certain purposes therein described), showing the sums available for such purposes and the several sums required and the total net annual value of such properties as are sewered and of such properties as are not (sub-sec. 1). Before proceeding to make the rate notice of intention to do so and of the place where the estimate can be inspected is to be posted and advertised and the estimate is to be open for the inspection of ratepayers (sub-secs. 3 and 4). By sub-sec. 5 it is provided that "for the purpose of making any rate the Board shall adopt as the net annual value of properties the valuation in force at the time of making the rate in the municipalities within which the properties respectively are situated. Sub-sec. 6—"After the estimate has been prepared and notice given the Board may . . . . make and levy the rates following, viz.:—(*a*) Upon every sewered property a rate to be called the metropolitan general rate which . . . . shall be a rate of one shilling in the pound of the net annual value of such property; (*b*) upon every unsewered property (in so much of the metropolis as is described in the 4th Schedule of the Act No. 1491) a rate not exceeding in any year twopence in the pound of the net annual value of such property."

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The property in question was within the municipal district of the City of Melbourne, which is within the district described in the 4th Schedule of the Act. Prior to the year 1901 no municipal valuation of the University property had been made, but in that year the City of Melbourne claimed to rate the University in respect of such property (including the houses owned by the University and occupied by the defendant Spencer and other officers of the University), and the usual municipal valuation was accordingly made. The University gave due notice of appeal, but before the appeal came on for hearing the Council of the City of Melbourne abandoned their claim to rate the University, and on 19th July 1901 wrote that "these properties will be exempted from rating."

In the years 1899 and 1900 respectively the Board made or purported to make upon every unsewered property in the part of the metropolis abovementioned a rate of twopence in the pound on the net annual value of such property.

On 16th July 1901 and on 12th August 1902 respectively the Board made or purported to make upon every sewered property a "metropolitan general rate" of one shilling in the pound of the net annual value of such property.

The defendants refusing to pay such rates after demand, the plaintiff sought in this action to recover them, and also asked for a declaration "that the property in question is rateable by the plaintiff according to its net annual value as shown by the valuation in force, at the time of the plaintiff making such rate, in the municipality of the City of Melbourne, or if there be no such valuation in force then according to the actual net annual of such property."

Various defences were raised and argued, but as the learned Judge bases his judgment solely on the first defence mentioned by him, the facts and arguments are set out in this report only so far as they relate mainly to questions of law involved in such defence.

Mitchell (with him *Lewers*) for the defendants—By sec. 8 (5) of the *Melbourne and Metropolitan Board of Works Act* 1897 (No. 1491) it is provided that "for the purpose of making any

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rate the Board shall adopt as the net annual value of the properties the valuation in force at the time of making the rate in the municipalities within which the properties respectively are situate." There is no other provision or machinery for valuation or for appeal from such valuation. As a matter of fact the resolutions of the Board making a rate in the present case are expressed as being "on the municipal valuation in force." Except in the year 1901 there has never been any municipal valuation in respect of the defendant's property. The effect of the notification (given by the City of Melbourne to the University after notice of appeal against its valuation in 1901) that the property would be exempt from rating was the same as if the appeal had been allowed and the valuation amended by reducing the rateable value of the property to *nil.*

Isaacs, K.C., and *Starke* for the plaintiff—The mere fact that there is no municipal valuation in force in respect of any particular property is not sufficient to preclude the Board from making a rate and levying it on the annual value of that property. By virtue of sub-sec. 6 the Board has power to make and levy the rate on the net annual value of the property. Where there is a municipal valuation in force that is the valuation to be adopted. Where it exists it is conclusive as to the value. But in its absence the rate is still leviable on the "net annual value." By sec. 8 (8) it is provided that in any proceeding to recover a rate a certificate of the Board shall be *primâ facie* evidence of such rate and all matters relating thereto. Further, a valuation of this property was actually made by the City of Melbourne in 1901. The most that the City Council did was to yield to the contention of the University that the property was not rateable. That cannot affect the Board's power to rate. There was no alteration or amendment of the valuation. The City Council has no power to amend a valuation. That can only be done by a court of law sitting on appeal from the valuation: *Attorney-General* v. *Hampden* (*a*); *Local Government Act* 1890, sec. 274.

They also referred to *Melbourne Corporation Acts* (6 Vict.,

(*a*) 2 V.L.R. (Eq.) 138.

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No. 7, sec. 867; 8 Vict., No. 12, sec. 20–23); *Castle on Rating* (3rd ed.), p. 578; 27 Vict., No. 178, secs. 42–44; *Local Government Act* 1891, secs. 60–61.

Mitchell in reply.

Cur. adv. vult.

HODGES, J., read the following judgment:—This action is brought by the Melbourne and Metropolitan Board of Works against Professor Spencer and the University of Melbourne to recover certain sewerage rates alleged to be due to the plaintiff corporation in respect of property owned by the University and occupied by the defendant Professor Spencer. Apart from the important general question as to whether the property owned by the University is rateable, the defendants rely on two objections—(*a*) That there is no valid valuation in force of the property in question, and such valuation is a condition precedent to the making or levying of a rate. (*b*) That no sewered property rate can be made, as the property in question does not, nor does any part of it, abut upon any sewered street.

(*a*) As to the objection that there is no valid valuation in force, and that such is a condition precedent to making or levying a rate, Act 1491, sec. 8, sub-sec. 1, empowers the Board to cause an estimate to be prepared showing the moneys required and the total *net annual value* of such properties as are sewered, and of such as are not sewered. Sub-sec. 5 provides that, "for the purpose of making any rate *the Board shall* adopt *as the net annual value* of properties the *valuation in force* at the time of making the rate in the municipalities within which the properties respectively are situate."

Then sub-sec. 6 provides that, after the estimate has been prepared, etc., the Board may make and levy rates on the net annual value of such property.

I take it to be clear from the words of this section that the rate cannot be made and levied on any property unless the net annual value of such property has been ascertained, and by sub-sec. 5 the net annual value in the case of the property now under consideration is to be ascertained by finding out the

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valuation in force in respect to this property in the City of Melbourne. This seems a necessary and reasonable construction of this Act, as it provides no machinery for valuing property, no means by which the parties concerned can have any say in the valuation, nor does it provide any method by which the parties can dispute its fairness or correctness, whereas the *Municipal Acts* provide means for determining these questions.

I have, therefore, to determine whether there was at the time of making the rates in question any *valuation in force* in the City of Melbourne in respect of the property in question. A valuation of this property had been made for the City of Melbourne. The University of Melbourne duly gave notice of appeal against such valuation, upon the grounds, *inter alia*—"That the property was not rateable; unfairness in the valuation; incorrectness in the valuation." This notice was considered by the City Council, and the University was by its authority notified that this property would be exempt from rating. No rates have been claimed or paid in respect of such valuation and rating. But the matter never went into Court. There is no doubt that the question of the valuation was never considered by the City Council. All claim for rates in respect of the property was abandoned, on the ground that the property was not rateable at all. It is now contended, on behalf of the Board, that the valuation stands, and that the City Council did not, and could not, alter the valuation; that a Court, and a Court only, could alter the valuation. In support of this contention, the case of *The Attorney-General* v. *The Shire of Hampden* (*b*) was relied upon. That case undoubtedly decides, and if I may so, rightly decides, that the council cannot of its own motion alter a valuation. If it could of its own motion alter a valuation by diminishing it, it could also by raising it. The Act gives no such power to the council of a municipality, and the exercise of such a power would lead to inextricable confusion. But it is quite a different matter where the council does not act of its own motion as here. In this case there was a notice of appeal duly given and served.

(*b*) 2 V.L.R. (E.) 138.

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By the *Local Government Act*, secs. 276 and 277, the parties are then in the position of appellant and respondent; and when they are placed in that position by the Act, I can see no reason why the appellant and respondent should not be able to meet and adjust their differences; no reason why the respondent should not agree with the appellant that he should allow his appeal to lapse if he finds that he has no ground for appealing, and why it should be constrained to go on with the appeal. Nor can I see any reason why the Council, if it finds that it is in the wrong, should be constrained to continue its opposition to the appellant, and heap up costs, when it knows that the appellant is in the right.

In my opinion, when the parties are under the Act in the position of appellant and respondent, they are placed in the position of ordinary appellants and respondents, with full authority to contest the matter to the end, or to settle their differences. In my opinion, the settlement by the City Council was a valid settlement, and would have been valid if, instead of going to the whole matter in dispute, it had altered the valuation. In this case it amounts to a settlement that the rateable value of this property is *nil*. The Council, by its act, has prevented an adjudication on all the matters contained in the notice, and there is, in my opinion, no valid valuation in force in respect of this property. On this objection judgment should be entered for the defendants.

As to the rates for "sewered property," I am inclined to think that the plaintiff must fail, as the property in question does not, in my opinion, "abut on" a sewered street, but as the other objection is an answer to the whole action, I have not felt it necessary to deal with this question, nor with the larger one as to whether any of the University property is rateable.

Judgment for defendants, with costs.

Solicitors for the plaintiff: *Fink, Best, & Hall.*
Solicitors for the defendants: *Nunn, Smith, & Jefferson.*

J. M.

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WHYTE *v.* WILLIAMS *and Another.*

HODGES, J.

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February 16, 26.
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May 14.

Insolvency — Grocer's licence — Action to enforce right to purchase — Order of Court giving option of purchase — Proviso in fraud of insolvency law — Injunction against transfer of grocer's licence—Order of Court purporting to bind official assignee in case of insolvency—Property passing to official assignee —Equitable interest in insolvent's property—Official assignee—" Privy."

A., the holder of a grocer's licence, agreed that, should he desire to dispose of the licence, he would give B. the first option of purchasing it for 40*l.* A. attempted to sell the licence to C., whereupon B. brought an action against A. and C. claiming specific performance of the agreement and an injunction to restrain the sale to C. In this action an order of the Court was made by consent ordering that "upon payment of the sum of 40*l.* by B. when required to do so by A. his executors or administrators A. his executors administrators or his official assignee D. should he become insolvent" should transfer the licence to B., provided that "if A. should become insolvent B. shouldbe entitled to pay 40*l.* and obtain a transfer of the licence;" and granting a "perpetual injunction against A. his executors administrators or assigns in insolvency should he ever become insolvent" from transferring the licence to any person other than B.

A. afterwards became insolvent, and D. was appointed the official assignee of his estate.

Per the Full Court (MADDEN, C.J., WILLIAMS and HOOD, JJ.), affirming the decision of Hodges, J.:—

Held, that D. was not bound by any of the provisions of the consent order, as he was neither a party to the action nor a "privy" to a party thereto.

Held also, that the proviso for the transfer of the licence to B. on the insolvency of A. was void as against the policy of the insolvency law.

Held further, that the whole property in the licence passed to D., and that B. had no equitable interest therein.

Ex parte Mackay ([1873] L.R. 8 Ch. 643) and *Ex parte Barter* ([1884] 26 Ch. D. 510) followed.

ACTION.

The plaintiff was William Henry Whyte, and the defendants were Richard Williams and James Henry Curnow, assignee of the insolvent estate of Williams. The consent order of 19th September 1900, referred to below, contained the following clause:—"And it is further ordered that a perpetual injunction by consent shall be and the same is hereby granted herein against the said Richard Williams his executors administrators or assigns in insolvency should he ever become insolvent his trustee under any deed of arrangement composition or assignment from transferring the said grocer's licence or any interest therein to any person other than the plaintiff his executors administrators or assigns or nominee or nominees in writing and

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subject to the conditions hereof from doing anything or omitting to do anything whereby the said grocer's licence or any renewal thereof may be injuriously affected cancelled or become void."

After the insolvency of Williams, plaintiff formally tendered the sum of 40*l.* to the defendants, and demanded a transfer of the licence; and subsequently the defendant Curnow wrote to the plaintiff intimating his intention to sell the licence at the expiration of seven days if the proceedings threatened by the plaintiff were not instituted.

At the trial evidence was given that the licence was at all times material worth about 450*l.*

The other material facts are fully set out in the judgment of Hodges, J., below.

Mitchell and *Cussen* for the plaintiff.

Isaacs, K.C., and *McArthur* for the defendants.

Cur. adv. vult.

HODGES, J., read the following judgment:—In 1892 the defendant Williams was a wine and spirit merchant carrying on a business in Bendigo, and was desirous of obtaining a grocer's licence. He had an interview with the plaintiff (who was then under 21 years of age) and with the plaintiff's uncle—William Kenneth McKenzie—who was a wine and spirit merchant carrying on business as such in partnership with the plaintiff's father, David Whyte. The outcome of these interviews was that the defendant Williams acquired a grocer's licence, and that plaintiff and defendant executed a deed in 1892. It is suggested that the plaintiff's father or uncle or both had acquired this licence and transferred it to the defendant Williams. I am not by any means satisfied that either or both had acquired such licence. I am only satisfied that they knew a person who had a licence and was willing to transfer for 40*l.*, and either that he was willing to wait for the money, or that the plaintiff's father or uncle or both were willing to find the 40*l.* and give the defendant Williams time to pay it in consider-

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ation of his executing the deed above referred to. The deed itself is somewhat against the plaintiff's contention on this point, for it says "That the said Richard Williams being the holder of a grocer's licence recently transferred to him by William Stembel"; so that, according to this, the licence was transferred to him by William Stembel. It may be that the plaintiff's father or uncle had previously acquired some interest in this licence, but on this question I am not clear. But I am clear that, whatever interests such persons may have had, the licence was transferred to the defendant Williams, and that the deed of 1892 expressed all that he had undertaken in dealings with father or uncle, or both, and plaintiff, and that it fully satisfied any promises that the defendant Williams had made to any or all of such persons as to transferring the licence to the plaintiff.

Some time in 1900 the defendant Williams was proposing to dispose of this licence to one Greaves, whereupon the plaintiff issued a writ against the defendant Williams and Greaves, claiming *inter alia* an injunction to restrain Williams from disposing of the licence. Some negotiations must then have taken place between the plaintiff and Williams and Greaves, and in the result a consent order was made by the Chief Justice on the 19th September 1900.

Subsequently, in 1902, Williams became insolvent, and his estate, was, by an order of the 15th January 1902, sequestrated, and the defendant Curnow was appointed assignee of such estate under the provisions of the *Insolvency Act* 1890.

The plaintiff has offered to pay the sum of £40, and claims—(1) a declaration that he is beneficially interested in the licence; (2) a transfer of the licence, or that the defendants will do all acts that will enable him to get the licence transferred; and (3) an injunction to restrain the defendants from transferring the licence. The plaintiff in the first instance bases his claim on the deed of 1892. By that deed the defendant Williams covenanted with the plaintiff that whenever he should desire to dispose of the said licence he would give notice in writing to the plaintiff of his desire, and in consideration of £40 to be paid by the plaintiff to the defendant Williams, the defendant Williams

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would sell and do all necessary acts and things to transfer the licence to the plaintiff, or to such person as plaintiff might direct; that defendant Williams would renew the licence from time to time, would not allow the licence to lapse, or do anything whereby the transfer thereof to the plaintiff could or would be prejudicially affected. The deed also contained a proviso that the plaintiff should have the option of fulfilling or declining the sale, and declared that the intention of the deed was to ensure the first offer to the plaintiff. With regard to that deed it is sufficient to say that—apart from the proposal to sell to Greaves in 1900 all plaintiff's rights in respect to which are contained in the consent order referred to above—there is no evidence the defendant Williams desired to dispose of the licence, and, although the sequestration was on his own petition, he may still desire and hope that he may again carry on business under that licence; and as to the negative covenant, I am of opinion that it was not intended to apply, and does not apply, to the case of the defendant Williams becoming insolvent, and further I very much doubt whether the said defendant could have lawfully bound himself by a covenant of this kind against insolvency. But in my opinion that deed may now be disregarded, as all rights under this document are absorbed in the consent order, and the plaintiff must, in my opinion, succeed on that order or fail altogether.

The plaintiff next bases his claim under that consent order of September 1900. The most important clause of that order, so far as this action is concerned, is the 4th, which is in the following words:—"That upon payment of the sum of 40*l.* by the said William Henry Whyte his executors administrators or assigns at any time the same may be required by the said Richard Williams his executors or administrators and signified by him or them by a sufficient notice in writing the said Richard Williams his executors or administrators or his official assignee James Henry Curnow or Ronald Rankin or any other official assignee in insolvency or trustee in insolvency should he ever become insolvent or his trustee under any deed of arrangement composition or assignment for the benefit of creditors will do all things necessary to transfer the said grocer's licence or any renewal

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thereof to the said plaintiff or his nominee signified in writing to the said Richard Williams at any time it is desired to transfer or dispose of the said grocer's licence. Provided that if the said Richard Williams becomes insolvent or makes any such deed of arrangement composition or assignment as aforesaid the said William Henry Whyte his executors administrators and assigns shall be entitled forthwith to pay the said sum of 40*l.* and to demand and obtain a transfer of the said grocer's licence as aforesaid."

This is a very peculiar clause. In the first part it provides that, upon payment of 40*l.* by Whyte when required by Williams, his executors or administrators, the said Williams, his executors or administrators or his official assignee, James Henry Curnow, or Ronald Rankin, or any other official assignee or trustee in insolvency, will do all things necessary to transfer the licence. This does not say to whom the 40*l.* is to be paid. But it would seem that on payment of 40*l.* to Williams, his official assignee was to do all things necessary to transfer the grocer's licence to Whyte. Again, neither Curnow nor Rankin was Williams's official assignee. Williams was not then insolvent. This is simply an effort to make persons parties—or at any rate appear to be parties—to a judgment who were not and could not be made parties, and an effort to tie the hands of any assignee or trustee Williams might have if Williams became insolvent. Then comes the proviso on which plaintiff's claim is really based. By this it is provided that if Williams became insolvent, Whyte should be entitled to pay the sum of 40*l.* and demand and obtain a transfer of the licence. Here again it is to be noticed that the consent order does not state to whom Whyte was to pay the money, nor to whom he is entitled to make his demand, nor from whom he is to obtain a transfer of the licence. Does this clause in the order bind Curnow, Williams's assignee, to transfer? In my opinion it does not. Curnow was in no sense a party to that order—was not in any way before the Court. And such an order in my opinion could no more define the duties or restrict the powers of Williams's assignee, if he should ever have one, than it could define the duties or restrict the powers of any other person's

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assignee. I have no doubt that it was intended by some of the parties to this consent order to do something which they believed that they could not do by mere agreement; that is—in case of Williams's insolvency—to give this valuable asset to the plaintiff for an inconsiderable sum. The judgment or order may be perfectly good and binding on Whyte and Williams, who were parties to it, and may (I do not say it does) give the plaintiff some right to prove against the estate; but as an attempt by two persons to settle by a consent order that the property or part of the property of one of them is to pass to the other if that one becomes insolvent, it must fail to bind the assignee in insolvency. It was also argued before me that this grocer's licence was a mere personal right, and that it was not property and did not pass to Williams's assignee under the *Insolvency Act* or any other Act. I don't propose to stop and inquire whether this licence is property that would pass to the assignee under the Insolvency Statutes in case of the insolvency of a licensed person. Sec. 115 of the *Licensing Act* 1890 authorizes the assignee or trustee of a licensed person by an agent specially authorized in writing by the Licensing Court to carry on the business of such licensed person until the expiration of the licence. The licence must therefore have passed from the insolvent. The claim will therefore be dismissed with costs.

Judgment for defendants, with costs.

From this judgment the plaintiff appealed.

Mitchell (with him *Cussen*) for the plaintiff, appellant—The consent order was a compromise by which the plaintiff gave up the enforcement of his right to get the licence then and there transferred for 40*l.*, and contented himself with the protection of the injunction, and the right to get the licence, in the event of Williams's insolvency, for 40*l.* That was a "dealing with the insolvent made in good faith and for valuable consideration" within the meaning of sec. 74 (3) of the *Insolvency Act* 1890, and was therefore valid. The original agreement is not merged in the consent order. They co-exist

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and the position is that, if Williams is desirous of selling, he must give plaintiff notice, and cannot transfer to anybody else, and consequently must sell to the plaintiff. As to the right to enforce by injunction a negative stipulation, see *Donnell* v. *Bennett* (a) and *Grimston* v. *Cunningham* (b). Further, having regard to all the facts, this compromise, even if it has not been embodied in an order of the Court, would not offend against the principle which makes certain agreements void as being against the policy of the *Insolvency Acts*. The principle laid down in *Ex parte Barter* (c), that "the owner of property may, on alienation, qualify the interest of his licence by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment and delay of his creditors, the *jus disponendi*, which for the first purpose is absolute, being in the latter instance subject to the disposition previously prescribed by law," does not apply in the circumstances here. Even if the plaintiff and his uncle did not acquire the licence absolutely, they at least acquired a control over it, though they allowed Williams to enjoy it. The fact that Williams promised to sell for 40*l.* what was in fact worth about 450*l.* is itself evidence of this. The consent order does not place the plaintiff in a better position after insolvency than before insolvency. The plaintiff has an equitable interest—a judgment of the Supreme Court debarring Williams from selling to anybody but the plaintiff, and giving the latter an enforceable right to get the licence for 40*l.* One effect of the consent order is that, if Williams or his assignee in insolvency offered the plaintiff the licence for 40*l.*, he must buy it. The property passes to the assignee in insolvency subject to the equities in the plaintiff in regard to it. The assignee in insolvency is in effect a trustee for the plaintiff. Quite apart from being specifically named therein, the consent order is clearly binding on the assignee in insolvency, and he, equally with Williams, is bound by the injunction. The assignee might carry on the business for a certain time, but as soon as he stops

(a) [1883] 22 Ch. D. 835. (b) [1894] 1 Q.B. 125.
(c) 26 Ch. D. 510, at pp. 519, 520.

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doing so he must sell to the plaintiff. The assignee merely steps into the shoes of the insolvent. Though in a sense personal, the injunction is in regard to this particular property. There would be in fact no fraud on the creditors of the insolvent, because the estate would receive 40*l.*, which was all that the insolvent paid for the licence. Further, having regard to the *Licensing Act* 1890, the licence is a personal one, and the right of property in it cannot be affected, nor can it be transferred, except under the provisions of that Act: See *Anthoness* v. *Anderson* (*d*). The only person who can go to the Licensing Court and get the licence transferred is Williams, in whose name it is. There is no provision enabling the assignee in insolvency to dispose of the licence. The consent order is binding upon Williams, if not on the assignee, and restrains him from transferring the licence.

Isaacs, K.C. (with him *McArthur*) for the defendants, respondents—If an agreement such as that contained in the consent order be good, the whole structure of the *Insolvency Acts* would be destroyed. A man would be able to give, contingently on his insolvency, the whole of his property for a certain sum, however inadequate, and the creditors would have no redress. The principle of *Ex parte Barter* (*e*) has been applied in *Ex parte Mackay* (*f*). The whole question is whether the property was absolutely sold to the plaintiff before the insolvent, and Hodges, J., has decided that there was no such sale. Had the property been the plaintiff's there would have been no necessity to attempt to bind the assignee in insolvency at all. The assignee in insolvency is not in fact bound by the consent order, as he was not a party to the action, and was not then even in existence as assignee. If the consent order had declared that there was a property in the plaintiff, then it would have bound the official assignee; but an injunction against a person cannot bind his assignee in insolvency, who may be required by law to do the very thing enjoined on behalf of the creditors, for whom, and not for the insolvent, he is a trustee. A man cannot

(*d*) [1887] 14 V.L.R. 127. (*e*) 26 Ch. D. 510, 519, 520.
(*f*) L.R. 8 Ch. 643.

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fetter his property by an injunction any more than he can by a sale which is only to take effect upon his insolvency. An injunction does not create a right, but only a remedy where there is a right *aliunde*. In *Donnell* v. *Bennett* (*g*) the point was whether the plaintiff could get an injunction, or whether he was restricted to damages. An injunction has nothing to do with the passing of property. The assignee could not compel the plaintiff to purchase for 40*l*. if the latter were unwilling to do so. The word "assigns" in the proviso to clause 4 of the consent order means somebody to whom Williams has personally assigned. His assignee in insolvency is not *his* assignee. Though a man may voluntarily sequestrate his estate, the transfer is by operation of law.

(He was stopped.)

Mitchell in reply referred to *Duffy and McHugh on the Insolvency Act* 1890, pp. 89, 90.

MADDEN, C.J. We are of opinion that this appeal should be dismissed. The plaintiff sues upon a contract of record, which is embodied in a judgment of this Court arrived at by consent between the parties to an action, who were the plaintiff Whyte, the defendant Williams, and one Greaves. By that particular agreement—so far as we need trouble about it now—Williams agreed with Whyte that if at any time Williams desired to transfer or dispose of the licence in question, he should give notice to that effect to Whyte, and thereupon the latter was to have the right to pay 40*l*. and to have a transfer from Williams of the licence. That was the whole matter between them attested by this judgment so long as Williams remained solvent. Then there is a proviso that if Williams became insolvent "Whyte his executors administrators and assigns shall be forthwith entitled to pay the said sum of 40*l*. and demand and obtain a transfer of the said grocer's licence as aforesaid."

Now, if there was no other feature present than merely this, that Williams was to have the right to retain this licence so long as he chose, and so long as he remained solvent, with the

(*g*) 22 Ch. D. 835.

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condition that, if he desired to sell, Whyte was to get notice and to have the right to buy at 40*l.*, but with the proviso that, if Williams should become insolvent, Whyte should then be entitled as a matter of course upon that event to obtain the licence for 40*l.*, then the cases of *Ex parte Barter* (*h*) and *Ex parte Mackay* (*i*) make it quite clear that that proviso would be quite ineffectual. A man cannot make an agreement with another that he is to enjoy his property until he becomes insolvent, and that then it shall pass to that other, even for an agreed sum, because the principle of the insolvency law is that all the property a man has in his enjoyment at the time of his insolvency is to pass to his official assignee or trustee; and he cannot, upon a mere contingency, give that property to anyone else but the person to whom the law gives it. Therefore, if the contract stood merely as in the judgment, when the plaintiff sued upon it, that proviso would be clearly bad. Williams has become insolvent, and therefore that particular part of the contract would operate, if any. It is said by counsel for the plaintiff that the facts here show a different condition of things from that. He admits that the general proposition of law as laid down in those cases is right, and says that he cannot contend against it, but he says that in this case there was originally a bargain under seal between the plaintiff and Williams, by which Williams undertook that, if he should desire to dispose of this licence, he would give notice to Whyte of such desire, and Whyte would then be at liberty to buy it, if he thought fit, for 40*l.*, and have it transferred to him. It is said as a matter of fact that Williams did desire to sell the licence, as was manifested by his attempt to sell and transfer it to the said Greaves, and that thereupon the plaintiff sued him in the action before-mentioned, in which he demanded specific performance of the contract that he should have the right to purchase this licence for 40*l.* It is said that, that action having been brought, its effect was to vest the plaintiff, Whyte, with an equitable interest which was really indefeasible, and that its effect was in equity to transfer the interest in this licence from Williams to Whyte; that all the conditions had occurred which

(*h*) 26 Ch.D. 510. (*i*) L.R. 8 Ch. 643.

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in the agreement under seal would have entitled Whyte to insist that he should be allowed to purchase for 40*l.*; and that he wanted to purchase for 40*l.*; and that he wanted, therefore, to force Williams to give him a transfer of the licence for 40*l.* Now, it is very true, apparently, that the condition contemplated by the agreement did happen—Williams manifested his desire to sell, and being in a mind to sell, he was bound to sell to plaintiff and no one else. That is true enough. But the plaintiff, in order to establish any equitable transposition of the property, was bound, we think, to have taken some action which would have that effect in equity, as for example going to Williams and saying—"Any conditions which were to operate in my favour have occurred. Here is 40*l.*; give me a transfer." If Williams had given him a transfer, then that which was afterwards done in this judgment would have been entirely free from the objections to which, according to the argument presented by counsel for the defendants, it is obnoxious. In that case what would have happened would have been this: Whyte would have been the true owner of the property, and he would have allowed Williams to enjoy the property until the latter's insolvency, and then he would have had to hand back the property, which was Whyte's property, to Whyte. That would have been quite outside the decision in *Ex parte Mackay* (*k*). Then they would not have been dealing with Williams's property, but with Whyte's property, and this property would have been properly handed back to the true owner, Whyte—that is apart from any question of the insolvency law as to property in the apparent possession of the insolvent. Broadly, that would have been the position in which Whyte would have been, and then he would have had such an equitable interest as his counsel has contended for. But in this case he had nothing of that kind. He simply brought an action in which he endeavoured to force Williams to give a transfer of the property to him. He never pursued that action to a judgment under which he could force Williams to give him a transfer. Before the action was tried, the parties agreed to a compromise, which was embodied in the judgment of the Court referred to. Counsel for the plaintiff says that all the evidence is one way to

(*k*) L.R. 8 Ch. 643.

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show that there was such a transposition of the property
equity as he contended for. Assuming there is such eviden
there is certainly evidence from which the learned Judge bel
could draw the conclusion, which he has drawn, that such
transposition did not take place. The consent order co
templates that the property still remains in Williams, and ne
passed to Whyte, and therefore, assuming that there was a
evidence from which he might have inferred that the prope
had passed from Williams to Whyte, there is certai
abundant evidence from which the learned Judge could ha
concluded that it had not so passed, and he has so found; a
this Court ought not to disturb a finding of that kind open
the Judge below and established by reasonable evidence.
that be the case, there is certainly no equitable interest
Whyte which would entitle him to withdraw that licence fr
the apparent assets of Williams upon Williams's insolven
The licence remained therefore in Williams, and, Willia
becoming insolvent, it passed to his official assignee, and th
could be no agreement which would be lawful which wo
prevent it passing. It may be observed, in further maintena
of that view, that the agreement under seal was an agreem
which bound Williams to give Whyte the first chance of buy
the licence, but under which Whyte was at no time under a
obligation to buy at all. That agreement did forbid Willia
from selling to anybody but Whyte, but it did not bind Wh
to buy if Williams wanted to sell; and consequently
position was one which called for some definite and disti
action on the part of Whyte, when he desired to act upon
privilege he had under the agreement, so that the prope
might pass to him. We therefore think that, in point of le
right under this agreement, this licence was still part
Williams's property, and passed to his assignee.

In the agreement embodied in the judgment there is t
provision, that "a perpetual injunction by consent shall be a
the same is hereby granted herein against the said Richa
Williams his executors administrators or assigns in insolve
should he ever become insolvent . . . . from transferr
the said grocer's licence or any interest therein to any per

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other than the plaintiff his executors administrators or assigns or nominee or nominees in writing." It is said now that, whatever the real relation of the parties as to the property is—no matter in which of them the property may be (it may be assumed, it is said, that the property is in Williams)—still that injunction, whether right or wrong, whether good in point of law or not, is an injunction binding Williams and his assignee in insolvency. The learned Judge below has thought that that is not so. We think so too, because the assignee in insolvency was no party whatever to this agreed judgment. It is a principle of law that a judgment binds only "parties and their privies," and unless it can be said that an assignee in insolvency is a privy within that expression, then it could not bind him. The question then is, Is he such a privy? We think not, because the persons who would be privies to Williams are those over whom he has or may be said to have some control, as, for example, his executors and administrators or his servants or agents. All these would be bound by the injunction against him. The official assignee is a person who is assigned by law to take possession of the estate of the insolvent upon his becoming insolvent; and it makes no difference whether he becomes insolvent voluntarily or compulsorily, because in either case the preliminary steps are taken merely to show that he is insolvent, and the law does the rest. The law then passes on his estate to the official assignee, in whom it vests the property, and accordingly the assignee is in no way a privy to Williams, and in no way under his control until it is established that the estate shows a surplus, and then he becomes a trustee for the insolvent in respect only of that surplus. We think, therefore, if it is assumed that Whyte had not an equitable interest in this property, that it would be quite wrong to say that this injunction should operate against the assignee in insolvency of Williams. If Whyte had an equitable interest, the law would protect it without an injunction. The property would still pass to the official assignee, because he is the person who takes all the insolvent's property; but it would be clogged with all the equitable conditions which attach to it. We find with the learned Judge below that there is no such

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equitable clog upon this property established, and that it cannot come to the hands of the assignee so affected. As the property is in that position, and as the official assignee is not a privy of Williams, it would be quite wrong to enforce against him this judgment, to which he was not a party, and to which he never could have been a party. The appeal will therefore be dismissed, with costs.

WILLIAMS, J. I concur.

HOOD, J. Every *bonâ fide* disposition of property for good consideration before insolvency binds the official assignee. But no man can agree that property which will be his at the time of his insolvency shall be dealt with after insolvency in a manner contrary to that which the law prescribes. That is exactly this arrangement. Williams was bound by it so long as he was solvent, but after he became insolvent the official assignee was not bound.

Appeal dismissed, with costs.

Solicitors for the plaintiff: *Connelly, Crocker & Paling* (for *Connelly, Tatchell & Dunlop*, Bendigo).

Solicitors for the defendant: *B. P. Rymer* (for *Quick, Hyett & Rymer*, Bendigo).

H. I. C.

A'BECKETT, J.
1903
March 18.

THE KING *v.* AUSTIN *and Others.*

Administration and Probate Act 1890 (*No.* 1060), *s.* 112—*Duty payable on voluntary settlement—Trusts or dispositions to take effect after death of settlor—Settlor divesting himself of all interest in settled property.*

Where a settlor conveys property absolutely to trustees upon certain trusts, and divests himself entirely of all interest in the settled property, such settlement does not come within sec. 112 of the *Administration and Probate Act* 1890, even although, at the settlor's death, all the trusts of the settlement have not been satisfied and beneficiaries may not attain interests in possession for years afterwards.

INFORMATION by the Attorney-General.

The proceedings were originally commenced by the issue of a writ of *capias ad respondendum* on 30th June 1897, the

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original defendants being the executors of the will of James Austin, deceased. The defendants Stanley Austin and Frank Austin were afterwards joined by order of the Full Court—see *The Queen* v. *Austin* (a)—as representing the trustees, grantees, and transferees under certain instruments mentioned in the information. At the time of the hearing of the information the only surviving executor of the testator's Victorian estate was Joseph Henry Grey.

The amended information stated, *inter alia*, that on 9th November 1894 James Austin had an estate in fee simple in certain lands in Victoria known as Avalon and Yeo respectively; that on 6th November 1894 he was absolutely entitled to a mortgage debt of 24,000*l.*, secured on mortgage of certain real estate in Victoria called Longerenong, belonging to William Hose Bullivant; that on 9th November 1894 by a voluntary conveyance by deed duly executed he conveyed and assigned to Frank Austin and Stanley Austin, and one Edward Bath (since deceased), the Avalon estate upon certain trusts in the deed mentioned, and on the same date conveyed in a similar manner the Yeo estate to William Hose Bullivant and Joseph Henry Grey on certain expressed trusts. It was also alleged that on 6th November 1894 he assigned by voluntary deed his 24,000*l.* mortgage debt secured on Longerenong to Joseph Henry Grey and Frank Austin on certain trusts mentioned in the deed. On 16th May 1896 James Austin died, having made and executed his will on 8th May 1895, by which he appointed Edward Bath (since deceased) and Stanley Austin executors so far as regarded his property in Great Britain, and William Hose Bullivant and Joseph Henry Grey executors of his property in Australia and elsewhere out of Great Britain. The Victorian executors obtained probate in Victoria on 23rd September 1896.

The Crown alleged, as to the conveyances and assignment above referred to, that they were respectively wholly voluntary, and were respectively made and executed by the said James Austin with intent to evade the payment of duty under the *Administration and Probate Act* 1890.

(a) [1898] 24 V.L.R. 12.

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Also, that each of the said conveyances and assignment, and as to all the real or personal estate respectively comprised therein, was a settlement containing trusts or dispositions to take effect after the death of the settlor, within the meaning of sec. 112 of the *Administration and Probate Act* 1890; that at the date of the death of the said James Austin all the real or personal estate respectively comprised in the said settlements was still held by the defendants, to whom the same had respectively been conveyed or assigned, upon the trusts in the said settlements expressed to affect the same respectively, in so far as such trusts were or should now be deemed to have been then valid, and upon no other trusts whatsoever, save in so far as there was or might be a resulting trust as to all such real or personal estate in favour of the settlor or his estate arising by reason of the failure of all the trusts in the settlements expressed; that none of the settlements were ever registered within the time or in the manner prescribed by sec. 112 of the *Administration and Probate Act* 1890, nor had any duty ever been paid on any of the property comprised in any of such settlements; and that the Attorney-General would contend that, by reason of these matters, none of the trusts or dispositions in any of the said settlements contained were or should now be deemed to have been valid or capable of taking any effect after the death of the said James Austin, and that the whole of the beneficial interest as existing at the death of the said James Austin in all the real or personal estate comprised in the said settlements respectively was or should now be deemed to have been part of the estate of the said testator for the purposes of assessment and payment of duty under the *Administration and Probate Act* 1890.

The Attorney-General claimed, as against the executors of James Austin, 20,000*l.* for money due to the Crown under the *Administration and Probate Act* 1890 for duty under the said Act in respect of the several properties comprised in the several conveyances, assignment referred to, and alternatively as against the trustees or transferees of each of the properties affected, the amounts due under the Act according to the respective value of each property. Further, a declaration was

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alternatively claimed to the effect that the said conveyances and assignment were and are respectively settlements containing trusts or dispositions to take effect after the death of the settlor within the meaning of sec. 112 of the *Administration and Probate Act* 1890, and that none of the trusts or dispositions therein contained were or are valid, or took any further effect after the death of the said James Austin, and duty is payable in respect of the real or personal estate in such settlements comprised, and that payment of such duty may, if necessary, be enforced in the manner provided by secs. 112 and 113 of the *Administration and Probate Act* 1890.

The original information before amendment complained of the instruments having been executed with intent to evade the payment of duty under sec. 115. The Crown at the hearing abandoned this part of the case, in consequence of the decisions of the Privy Council in *Simms* v. *Registrar of Probates* (*b*) and *Payne* v. *The King* (*c*), and of the House of Lords in *Bullivant* v. *Attorney-General of Victoria* (*d*), and relied on the other matters claimed under sec. 112.

Under the Avalon settlement, the settlor recited that he was seised of the hereditaments therein described and intended to be thereby conveyed for an estate of inheritance in fee simple in possession, free from encumbrances, and in consideration of natural love and affection for his son Frank Austin and his son John Edward Austin he conveyed the hereditaments in question to the trustees of the settlement to hold the premises to the use of the trustees and their heirs and assigns upon certain trusts, viz., to raise by mortgage of the hereditaments the sum of 30,000*l.*, and to stand possessed thereof upon certain trusts, and subject to such trusts, in trust for and to convey and assure the lands unto Frank Austin in fee simple. The trusts declared as to the 30,000*l.* were to invest the same and pay the income thereof to John Edward Austin for life, and after his death to pay the income of 10,000*l.*, part of the trust fund, to Ada Austin, his wife, if she should survive him, *durante viduitate*, and, subject to the widow's right, to stand possessed of the trust

(*b*) [1900] A.C. 323. (*c*) [1902] A.C. 552.
(*d*) [1901] A.C. 196.

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fund in trust for all or any the children or child of John Edward Austin who should be living at the death of the settlor, or born afterwards, and who should attain the age of 25, or marry under that age, or survive the survivor of the settlor and John Edward Austin for the period of 21 years, and if more than one, upon such proportions that the share of each son should be double of the share of each daughter, but if only one child, and that a daughter, the trust fund to be held as to 20,000*l.* in trust for such daughter, and as to 10,000*l.* in trust for Mary Bullivant and Frank Austin equally, and if no such child, then in trust for all the grandchildren of the settlor living at John Edward Austin's death, and the issue then living of any grandchild of the settlor born in his lifetime, or within due time afterwards, who should have died leaving issue.

Under the Yeo settlement the settlor similarly conveyed to trustees an estate in fee simple in possession of the lands comprised therein, in trust as to one-third undivided part thereof for his daughter Anne Rebecca Porch for life, and after her death in trust for her children, in such shares as she should by deed or will appoint, and in default of appointment, or subject to a partial appointment, in trust for such children, as, being sons, attained the age of 21 years, or, being daughters, attained that age or married; and in case there should be no such children, in trust for all the grandchildren of the settlor living at the death of Anne Rebecca Porch, and the issue then living of any grandchild of the settlor born in his lifetime, or within due time afterwards, and having died leaving issue. The remaining two undivided third parts were directed to be held upon similar trusts *mutatis mutandis* in favour of the settlor's daughters Elizabeth Porch and Fanny Fraser and their children.

The trusts created by the deed of assignment of the Longerenong mortgage debt were in favour of the settlor's daughter Mary Bullivant during her life, without power of anticipation during coverture, and after her death in favour of her children in such manner as she should by deed or will appoint, and in default of appointment, in trust for such children as being sons attained the age of 21, or daughters attained that

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age or married, equally, and in case of no child attaining a vested interest, the property to be held in trust for all the children of the settlor other than Mary Bullivant living at his death.

Weigall for the Crown—These settlements were purely voluntary, and were never registered. The trusts and dispositions of each of them were such that at the settlor's death they would as to the greater part of them almost necessarily remain still to be performed, and this in fact afterwards happened. It is submitted, therefore, that these settlements "contained trusts or dispositions to take effect after the death of the settlor" within the meaning of sec. 112 of Act 1060, and that the failure to register caused all such trusts and dispositions to be invalid to the extent that at the settlor's death they remained to be performed or "to take effect." On this view there was at the settlor's death a resulting trust for the settlor as to all the property then still held by the trustees of the settlements. The beneficial interest under such resulting trust vested in the settlor's executors as assets of the testator, and duty was therefore payable thereon. Where X. settles property on trust for his wife until *his* death, and afterwards for his children, such trusts would as to all property still held by the trustees at the death of X. be invalid for want of registration under sec. 112, and duty would be payable as to all the property so held: *Whiting* v. *Thompson* (*post*, p. 89). It is said, however, for the defendants here that, if the trust for the wife had been until *her* death, and if the death of the settlor himself had not been expressly referred to in the settlement, the position would be entirely different, and that in such a case no duty would be payable. It is submitted that there is no difference in reason or principle between the two cases; that in either case there are at the death of the settlor trusts "to take effect after" his death, and that the language of sec. 112 is wide enough to cover both cases.

[A'BECKETT, J. Do you say that if a man makes a voluntary settlement, with trusts to endure beyond his death, this sec. 112 applies at his death?]

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Yes. The principle is to tax the testator at his death in so far as he has got rid of property before death without valuable consideration, and so as to defeat the Act. There are two classes of cases, one under sec. 115 and the other under sec. 112. Sec. 115 covers conveyances to evade the Act, and sec. 112 covers voluntary settlements so made that in the result the property remains after his death to be dealt with according to his wishes. Nothing remaining to be done after the testator's death shall be done unless duty is paid. In sec. 112 the words refer to settlements "to take effect *after*" his death; in sec. 115 they refer to conveyances "to take effect *upon*" his death.

Cussen and *Sanderson* for defendants S. and F. Austin.

Higgins and *Hayes* for defendant Grey.

Counsel for the defendants were not called upon.

A'BECKETT, J. This action is peculiar in its circumstances in some respects. It begins as an action to have it declared that certain conveyances of property made by a gentleman 85 years of age, who died soon afterwards, were made with intent to evade the payment of duty. If the right to escape payment of costs depended upon a reasonable belief on the part of the Crown that it had a good cause of action, undoubtedly, in my view of the facts, so far as they appear, the Crown was perfectly justified in supposing that it had a good cause of action. After the action had begun came a decision of the Privy Council to the effect that, although the object of making a settlement might be the saving of the property comprised in the settlement from the payment of duty which it would be subject to if it remained part of the testator's estate, yet that is not enough. There must be other conditions, which are to be gathered from the judgment in *Payne* v. *The King*, which must also assist, otherwise no liability to duty arises. Then the Crown, in that state of facts thinks that a view may be taken of sec. 112 which unless they could not have succeeded under sec. 115, it would have been unnecessary to take, and that under another section altogether these settlements may be construed as settlements containing trusts or dispositions to take effect after the death of

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the settlor. The Crown then bases its contention upon sec. 112. I do not think that the construction which the Crown seeks to put upon that section can prevail. The section seems to contain within itself a clear intention that the death of the settlor should be referred to in the settlement as the time as to which something should take place, or when something which had not happened before should take effect. I do not accept the view put forward by the Crown.

I have to consider how I should deal with the costs. I think that the fact that at the time the action began the advisers of the Crown had good reason for supposing that they had a good cause of action does not exempt the Crown now from payment of costs when it fails in the position it took up. As a matter of judicial discretion, I cannot relieve it from such payment. I regret that I cannot do so. I think I must hold the defendants entitled to their costs, and therefore I give judgment for the defendants with costs.

Judgment for defendants.

Solicitors for the Crown: *Guinness*, Crown Solicitor.
Solicitors for defendants: *Harwood & Pincott.*

W. H. M.

WHITING *v.* THOMPSON.

Administration and Probate Act 1890 (*No.* 1060), *s.* 112—*Probate duty—Settlements.*

1900 Ap. 20
[21 A.L.T. 231]

A settlement containing trusts to take effect during the life of the testator as well as trusts to take effect after his death is within sec. 112 of Act No. 1060, and is liable to duty, and must be registered.

ORIGINATING SUMMONS.

The settlor, G. W. Thompson, was on and prior to 27th September 1895 possessed of an estate known as Challicum, containing 20,530 acres of freehold land, which was used by him in his business of a sheep and cattle farmer and grazier. From 1892 up to 27th September 1895, G. Thompson, a son of the settlor, acted as manager of the estate at a salary, having been appointed as such owing to his father's partial and increasing blindness. Owing to his infirmities the settlor executed a settlement of the estate upon 27th September 1895. This settlement recited that the settlor was desirous of making provision for his wife and two sons and their issue; that the settlor had agreed with C. E. Gates and R. S. Whiting (called the trustees) to transfer and convey to them the estate and also to assign to them the live stock, plant, chattels, furniture, and effects thereon, and that by transfer and by indenture of conveyance bearing even date the settlor had conveyed the estate to the trustees, and by deed of assignment

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had assigned to them the live stock, etc. The settlement then witnessed that in consideration of the premises the trustees agreed with the settlor, and declared that they would stand possessed of the estate, live stock, etc., upon trust at the discretion of the trustees to sell the estate, if within the settlor's lifetime with his previous consent, with power to postpone the sale and in the meantime to carry on the business of sheep-farming and grazing, with full power also to the trustees to let the whole or any part of the estate to raise money for improvements. It was further agreed and declared that the trustees should hold the moneys to arise from the sale upon trust to pay thereout all costs, etc., and to invest the residue upon certain securities, and that the trustees should stand possessed of the income upon trust during the life of the settlor, to apply the same or part of it for the benefit of the settlor, his wife, and his two sons and their issue, and subject to any such application to hold the income in trust for the settlor during his life. After the death of the settlor the trustees were to hold the income upon trust to pay an annuity to the settlor's wife, with power to set apart a sum to meet this annuity. Subject to such annuity the trustees were to hold the trust property in trust for the two sons of the settlor in equal shares. The settlement contained a further provision that the settlor might at any time during his lifetime by writing appoint that any sum or sums of money, not exceeding in the aggregate the sum of 5000*l.*, to be raised out of the capital, be paid to the settlor or to another person. The sum of 1119*l.* was paid as duty under the *Stamps Act* 1890 upon the settlement.

Upon the execution of the settlement the trustees took possession of the trust property, and carried on the business and managed it without interference by the settlor until 3rd May 1898, when C. E. Gates died. Thereafter the surviving trustee carried on the business himself. By deed poll made the 27th September 1895 the settlor, pursuant to the powers contained in the settlement, appointed to himself the sum of 2,500*l.* The settlor died on the 29th March 1897, leaving him surviving his wife and his two sons, both of whom were of age. The settlor made his last will, dated November 1896, appointing Gates and Whiting executors, and also a codical dated March 1897. Probate was granted to Whiting on 28th May 1897. A statement for duty in respect of the estate of the settlor was filed, but had not been passed or accepted by the Master in Equity, who, having required production of the settlement, notified the surviving trustee that it was liable to duty under the *Administration and Probate Act* 1890. This originating summons was taken out by Whiting to obtain the determination of the following questions:—(1.) Is the said indenture of the 27th September 1895 a settlement of property made by a person containing trusts or dispositions to take effect after his death within the meaning of sec. 112 of the *Administration and Probate Act* 1890? (2.) Having regard to the facts set forth in the affidavit, is any and what duty payable under sec. 112, in respect of the said indenture? (3.) If the second question be answered in the affirmative, should the duty so payable be borne by the property comprised in the said indenture or by the estate of the said G. W. Thompson, deceased, and is the plaintiff at liberty to raise the amount of duty so payable by sale or mortgage of the properties which should bear the same.

Higgins and *Hayes* for the plaintiff.

Topp for the defendant R. J. Thompson.

Cussen for the Master in Equity.

A'BECKETT, J. This is a case of considerable importance, but I do not think that I should obtain a clearer view of the points involved by reserving my

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judgment. I think the duty is payable. I arrive at that decision by considering that I must follow the words of the Act. This is beyond all doubt a settlement which does contain trusts and dispositions to take effect after the death of the settlor, and those trusts and dispositions affect the whole of the property. I think to limit the operation of the action to cases in which there is no immediate disposition of property would completely destroy its efficacy. Extreme cases have been pointed out on both sides, but I think the fact that cases may be put which it is difficult to reconcile with common sense cannot override the conclusion which is to be drawn from words which in themselves are decidedly sufficient to conclude the matter, and which must be done violence to in order to give them any other meaning. The view I take of these words is supported by the fact that it is considered necessary to introduce exceptions with regard to settlements which undoubtedly would contain trusts or dispositions to come into immediate operation, such as a life interest to the settlor as under this settlement. In this case none of the difficulties present themselves which might occur in exceptional cases, and my decision does not at all exclude the successful contention that the section is capable of a distributive construction. And in favour of that reading I think it is material to consider the limitation to the invalidity which befalls a settlement which is not registered, viz., that that invalidity attaches to the trust to take effect after death. It is not necessary for me to decide that such a distributive construction is not permissible. My decision does not at all negative the view that such a construction is permissible. That disposes of the first question. I answer it: "Yes."

As to the second question, I think it is sufficient to say that the duty is payable on the value of the property comprised in the settlement at the time of the death of the settlor, but the value of the property withdrawn from the settlement by appointment is not to be included in such value.

Then, as to the third question, whether the duty falls upon the estate generally—that is to say, the testator's estate or the settled estate. With regard to that, the Act does not appear to me to be very distinct in its directions, and this is a case in which it has not been necessary to argue the matter very closely, inasmuch as the beneficiaries are the same in either case. But, on the arguments addressed to me, I think that the provision in sec. 112 that "no settlement shall be registered unless the trustees . . . . have filed a statement . . . ." amounts to a direction that they are the persons who are liable for the payment of duty. The duty of stating what the property is appears to be cast upon them, notwithstanding the provision in sec. 102 which would make this duty a debt of the testator to be paid by the executor. The burden is cast upon the property which is the subject-matter of the settlement, and that accords with the direction in sec. 103, which makes the duty under this Act payable by the beneficiaries in proportion to the amount of the benefits they receive. There is no provision in the settlement as to payment. The payment is only to be made after the death of the settlor, and could not be made at the time of the settlement. The liability is one cast upon the trustees which would arise at a future time, and they are entitled to indemnify themselves out of the property. I answer the question that the duty is to be borne by the property comprised in the indenture, and that the plaintiff is at liberty to raise the amount by sale or mortgage.

Solicitors: *Whiting & Aitken*; *T. C. Altson*; *Guinness*, Crown Solicitor.

(Reported by J. C. Anderson, Esq., Barrister-at-Law.)

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June 18, 26.

ATLAS COMPANY OF ENGINEERS *v.* YORK.

The Service and Execution of Process Act 1901, *No.* 11 (*Commonwealth*), *ss.* 4, 6, 21—*Ineffective service of copy writ—Judgment—Irregularity or nullity—Further proceedings for same debt.*

The plaintiff, who was a resident in the State of Victoria, issued a writ of summons against the defendant, a resident of the State of New South Wales, under the provisions of the *Service and Execution of Process Act* 1901. The copy of such writ was not properly indorsed when served upon the defendant. The plaintiff obtained an order against the defendant, who did not appear, at the Court of Petty Sessions at Melbourne, where the case came on. This order was registered in New South Wales under sec. 21, and the defendant then obtained an order in New South Wales staying proceedings on such registered certificate. Some months afterwards the plaintiff issued another summons for the same debt, which summons was properly served, and the defendant appeared. An order was made against the defendant under this summons, and upon an order to review such order, on the ground that it was bad, inasmuch as the first judgment or order was still in existence,

Held, that the service of the copy of summons in the first proceedings rendered the service ineffective, but this constituted an irregularity only, and did not render the proceedings a nullity, and the judgment thereon was good until set aside; therefore the second order, made while the first order for the same debt was in existence, should be set aside.

Fry v. *Moore* ([1889] 23 Q.B.D. 395) applied.

Hewitson v. *Fabre* ([1888] 21 Q.B.D. 6) distinguished.

ORDER *nisi* to review.

The Atlas Company of Engineers sued the defendant, C. W. York, for the sum of 22*l.* 11*s.*, being the amount due for money paid, work and labour done, and goods sold and delivered. The Court made an order for the amount sued for. The plaintiff company carried on business in Melbourne; the defendant resided at Hay, in the State of New South Wales. It appeared that in September 1902 the plaintiff company had issued a writ of summons out of the Court of Petty Sessions at Melbourne, and a copy of the summons was served upon the defendant out of the jurisdiction. This copy summons did not bear the indorsements required by the *Service and Execution of Process Act* 1901. The defendant did not appear, and an order was made against him, the plaintiff having previously obtained leave to proceed under sec. 11 of the above-mentioned Act. Then under sec. 21 a certificate of this order was registered at Hay, and the defendant thereupon applied to the Court of Petty

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Sessions at Hay for an order staying all proceedings upon such certificate of judgment, and the order was granted upon the terms that the plaintiff should be at liberty to apply to have the same altered or annulled. The plaintiff took no further steps to proceed with such order, and on 17th April 1903 sent a notice to the defendant that it abandoned such order. On the 21st April 1903 the summons in this case was issued, being for the same cause of action as the original summons upon which judgment had been obtained. The defendant appeared, and all the requirements of the Act were complied with. The defendant's solicitor objected to the case being proceeded with, on the ground that there was already a judgment in existence for the same cause of action against the same defendant. The magistrate overruled the objection, and gave judgment for the plaintiff for the amount sued for. The defendant then obtained this order *nisi* to review such decision, upon the ground that the second judgment or order was bad, as there was a former judgment in existence for the same cause of action. The arguments fully appear in the judgment.

W. H. Williams to move the order absolute.

Dethridge to show cause.

Cur. adv. vult.

HODGES, J. On the 25th September 1902 a summons was taken out in the Court of Petty Sessions at Melbourne under sec. 4 of the *Service and Execution of Process Act* 1901 (Commonwealth), which was indorsed as required by sec. 5; a copy was served on the defendant, but this copy was not indorsed as required by sec. 5. Upon the return of the summons the defendant did not appear, and the plaintiff obtained leave to proceed under the provisions of sec. 11, and an order was made against the defendant in November 1902. Under sec. 21 a certificate of this order was registered in the Court of Petty Sessions at Hay, in the State of New South Wales, and in December the defendant obtained an order staying proceedings on the registered certificate, such order being obtained under

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sec. 25. On the 21st April 1903, another summons for the same cause of action was issued by the plaintiff, and this summons was properly indorsed, and a copy properly indorsed was properly served on the defendant. The defendant appeared, and an order was made against him.

The defendant now contends that this order is bad, as the original order or judgment in the court of petty sessions still stands, and that though there may have been an irregularity in the proceedings by means of which that order was obtained, still that order or judgment still exists. On behalf of the plaintiff it is contended that that judgment was a nullity, that it is nothing, and that it is therefore no bar to the proceedings that are being taken on the present summons. I was referred to the case of *Fry* v. *Moore* (*a*). In that case the plaintiff and defendant were British subjects at the time the writ was issued—a writ for service within the jurisdiction. The defendant not being served, the plaintiff obtained an order for substituted service of the writ, and having served the same in accordance with such order, signed judgment, and the question raised was whether or not the judgment and the proceedings were merely irregular or wholly null and void. It was determined by the Court of Appeal that they were merely irregular. Lindley, L.J. at p. 397, says:—"In the form in which it was issued it cannot be said that the writ was irregular, because the plaintiff might have kept it with the view of serving it on the defendant if he should come within the jurisdiction. The writ cannot therefore be set aside for irregularity. But then the plaintiff obtained an order for substituted service on the defendant's mother, who had been acting for him in some matters, and the writ was served on the brother. Was this right or wrong? Looking at the various rules relating to service out of the jurisdiction, I do not think this precise case has been provided for. But there are certain principles which govern the rules, and in *Field* v. *Bennett* the Queen's Bench Division laid down the principle that if a writ could not be served personally at the time when it is issued, there cannot be substituted service. That language is used for the purpose of showing that

(*a*) 23 Q.B.D. 395.

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the writ and order were irregular, and he then proceeds to consider whether it is a nullity. He says (p. 398):—"In the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served"—that is the important part—"and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could not be waived." Then he proceeds to consider whether it had been waived, and determined that it had been so waived, but held that it was an irregularity and not a nullity. I must take that case as authoritatively expressing the law on that subject.

Then there comes the case *In re Urquhart* (*b*), in which the head-note speaks of *Fry* v. *Moore* as being "explained and distinguished," but it is really very little beyond an acknowledgment of the correctness of that case; and in *Wilding* v. *Bean* (*c*) *Fry* v. *Moore* was followed. Since the argument counsel has handed me the case of *Hewitson* v. *Fabre* (*d*). In that case the defendant was a foreigner residing abroad, and the plaintiff sued him for goods sold and delivered to him in England, and obtained a judge's order for the service upon him of the writ out of the jurisdiction, the order being obtained upon an affidavit which stated erroneously that the defendant was a British subject. The writ was served upon the defendant in France, and judgment signed against him in default of appearance, and it was held that the service of the writ instead of a notice was a nullity and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside.

The question I have to consider is which of these two cases governs the one now under consideration. In my opinion these two cases are not in conflict at all, they are in perfect accord. In *Hewitson's Case* the defendant was not a British subject, was not resident in British dominions, and was altogether outside the jurisdiction of the British Court. The Court had no power to command the subject of another nation living in

(*b*) [1890] 24 Q.B.D. 723. (*c*) [1891] 1 Q.B. 100.
(*d*) 21 Q.B.D. 6.

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the territory of another nation to appear before it, and having no power to make any such order, or to order any such person, the proceedings were null and void. The utmost that could be done was that notice should be given to the individual concerned that proceedings were being taken in another country, but notice only and not a command. I think that that is the ground of difference between the two judgments. Now, within which does the present case fall? That takes me to the consideration of the *Service and Execution of Process Act.*

In this case the plaintiff was resident in Victoria, and the defendant was resident in New South Wales. According to our law before the Commonwealth came into existence, Victoria and New South Wales were practically foreign States, and neither had power to issue this process and command the appearance of a resident of one in the other State's jurisdiction. I have to consider whether this Act has altered the law, and in some degree the extent to which it has altered it. It must be noted that this is an Act of the Commonwealth Parliament; it is styled the *Service and Execution of Process Act*; the preamble states it to be "An Act to provide for the Service and Execution throughout the Commonwealth of the Civil and Criminal Process and the judgments of the Courts of the States and of other parts of the Commonwealth and for other purposes connected therewith; it suggests that it is not providing for one State or the other but for the whole Commonwealth. Sec. 4 makes provision for the issue of a writ out of any court of a State which may be served on a defendant in any other State or part of the Commonwealth as distinguished from the State from which the writ issues. Therefore there is a distinct intimation that it is a writ issued in one State commanding a defendant who is in another State to appear before the Court of the first State, and as it is a case in which the Federal Parliament had power to legislate it does make to some extent the two States one jurisdiction; to some extent, I say, but not perfectly, for it is giving the one court power to compel or require and command an individual in another State to appear before it. The Act then provides for indorsements which are to be made on writs for service out of the jurisdiction, and then in sec. 6 it provides that if a writ of

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copy thereof "does not bear all the indorsements hereby required it shall be ineffective for service under this Act." Without going further through the Act, it seems to me clear that this Federal Act gives the courts referred to in it jurisdiction throughout the Commonwealth, and the courts when acting under it exercise Commonwealth jurisdiction, and consequently the proceedings in this case are analogous to the case of *Fry* v. *Moore*, and not analogous to *Hewitson's Case*—that is, it comes within the principles of *Fry* v. *Moore* rather than within the authority of *Hewitson's Case*. It was urged that these proceedings were a nullity, because of the provisions of sec. 6, which I have just read. That section says that the writ is to be "ineffective for service," but that does not in my opinion make it a nullity. The original writ was properly indorsed, and therefore properly issued for service; there should have been a proper copy, and if a proper copy had been made there would have been a sufficient service. But it is the *service* only that is ineffective and irregular, and in my opinion the proceedings taken were *irregular* only, and, being irregular, the original judgment stands as a judgment irregularly obtained, and liable to be set aside on the one hand, or an irregularity which might be waived on the other.

Now I had some difficulty under these circumstances, while satisfied that the judgment was irregular only, in determining whether or not the judgment was a bar to further proceedings. The doctrine of estoppel has nothing to do with it, and I am not by any means clear that the doctrine of merger applies. There is no doubt that this Court of Petty Sessions is a Court of Record under the Act, but I doubt whether it is so within the common law sense of that term, and if it is not a Court of Record in that sense, I am by no means clear that the debt merged in the order. If it is not a Court of Record the simple contract debt is on the same level as an order of a court not being a Court of Record. In *Higgens's Case* (*e*) it is said—"If recovery be in debt on a bond in the county by justices, then, notwithstanding such judgment, the plaintiff may have an action of debt on the bond in a Court of Record; for the County Court is not of record, and

(*e*) [1606] 6 Coke 45A.

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therefore the bond is not changed into anything of a higher nature; but so long as the judgment remains in force the plaintiff shall not have another action by justices in the same Court for the infinite vexation of the party as hath been said." I think that is good sense and good law, and that it would not do to allow persons day after day to take proceedings, prosecuting them to judgment, without going further on the one cause of action. And while one judgment stands, as it does in this case, in Victoria, the plaintiff should not be allowed to proceed. The only question is, what is the proper order to be made? The magistrates decided in favour of the plaintiff's claim, but the plaintiff at the present time has two orders standing in Victoria for the same debt. I am disposed to ask counsel what they are prepared to do in this matter. I desire to stop all further proceedings in the matter, and to arrive at some finality.

Dethridge for the plaintiff stated that he did not think there was power to get an order vacating the first judgment, as it was not before the Court at the present time.

HODGES, J. Very well, then, I must merely make this order absolute, with costs.

Solicitors for plaintiff: *Goldsmith & Sharp.*
Solicitor for defendant: *Norman Bayles.*

W. H. M.

A'BECKETT, J.
1903
May 28, *June* 15.

SMITH *v.* SMITH.

Divorce—Marriage—Nullity suit—Prohibited degrees of affinity.

The marriage of a man with the daughter of the sister of his deceased wife is null and void.

THIS was a petition by husband against wife, seeking a declaration of nullity of marriage, alternatively dissolution of marriage on the ground of desertion.

Wadham for petitioner.

There was no appearance for the respondent.

Cur. adv. vult.

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A'BECKETT, J., read the following judgment:—This is a suit by husband against wife seeking a declaration of nullity of marriage primarily, alternatively dissolution of marriage on the ground of desertion. The petitioner married a daughter of the sister of his deceased wife. They cohabited for twelve days, and then the wife left him, assigning as a reason conscientious objections to a union forbidden by her church. The husband sought to induce her to return. After she had lived away from him for three years, he filed his petition. If the respondent had been the sister of his deceased wife instead of her niece, the marriage would have been valid under sec. 18 of the *Marriage Act* 1890, which provides that marriage with the sister of a deceased wife shall not be voidable or in anywise impeachable upon the ground of affinity. The daughter of a deceased wife's sister was within the prohibited degrees of affinity, but the Legislature omitted to validate marriage with her. Doubtless they would have done so if the necessity for such a provision had occurred to them. Marriage with a deceased wife's niece having been voidable before the marriage with a deceased wife's sister was made unimpeachable, remained voidable, and I have only to give effect to the law as it stands unaltered in this respect. The voidable character of marriage with a deceased wife's niece was considered in *In the Will of William Swan* (a), where it was held that though such a marriage was voidable, it revoked the husband's will. In *Wade* v. *Baker* (b) a decree of nullity was pronounced at the suit of a husband, on the ground that the marriage was with the sister of his deceased wife. It is no objection to a suit of this kind that both parties at the time of the celebration of the marriage were aware of the impediment: *Andrews* v. *Ross* (c). I therefore declare the marriage null and void.

Decree absolute in first instance.

Proctors for petitioner: *Sincock & Wadham.*

W. H. M.

(a) [1871] 2 V.R. (I. E. & M.) 47. (b) [1867] 5 W.W. & A'B. (I. E. & M.) 63
(c) [1888] 14 P.D. 15.

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HOLROYD, J.

1903
July 28.

[IN CHAMBERS.]

SMITH *v.* NEW DEMPSEY'S GOLD MINING COMPANY NO LIABILITY *and Others.*

Practice—Discovery—Application for discovery before delivery of statement of claim—Affidavit in support, necessity for—"Rules of the Supreme Court 1884"—Order XXXI.—"Rules of the Supreme Court 1900"—Order XXX.

No affidavit is necessary upon which to base an application for discovery and inspection of documents before delivery of a statement of claim, but the Judge in granting such application may act upon the facts as stated by counsel from their instructions.

SUMMONS FOR DIRECTIONS.

The plaintiff claimed, *inter alia,* a declaration that a transfer to the defendant company of a certain gold mining lease was ineffectual and void, and that the said lease belonged to the plaintiff and two of the defendants as co-owners in equal shares.

Hayes for the plaintiff—In order that he may properly shape his statement of claim the plaintiff desires discovery and inspection of all the documents relating to the alleged transfer and to the formation of defendant company. He desires to ascertain, for instance, whether 5 per cent. of the subscribed capital of the company was paid up before registration. If that percentage was not so paid then the defendant company was not properly incorporated, and its registration was invalid, even though a certificate has been given by the Registrar-General that it has been duly incorporated; and the transfer to it would be void and ineffectual. The plaintiff is willing, in accordance with the usual practice in these applications, to file an affidavit setting out the materials upon which he bases this application, but under Order XXX., rule 3, of "Rules of the Supreme Court 1900," he cannot do so without a special order.

Meagher for the defendant—The defendant company has a document in its possession showing an absolute sale by the plaintiff to the company.

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[HOLROYD, J. If you discover that document to the plaintiff he may discontinue.]

"The proper time for discovery is generally not until after defence, for until then it is not usually possible to say what is really material. A plaintiff will hardly ever be allowed discovery before statement of claim. From the earliest times the courts have set their faces against allowing discovery for the purpose of fishing out a case": See *Annual Practice* 1903, p. 371. The courts will not order discovery before delivery of statement of claim unless the materials in support are clear and express: See per Hood, J., in *MacKellar* v. *MacKellar* (*a*). If the plaintiff be allowed to file an affidavit, the defendants are prepared to file an affidavit in answer showing good reasons why the application should not be granted—*e.g.*, the six years' delay in bringing this action.

HOLROYD, J. I am disposed to allow discovery before the delivery of a statement of claim. Possibly I might direct the plaintiff to file an affidavit in support of his application, if that has become the established practice, but I am not aware that the practice has been so firmly established, and it is, moreover, directly contrary to the "Rules of the Supreme Court 1900," which say nothing whatever about giving leave to file an affidavit, so far as I am aware. In this particular instance, as in other summonses for directions, I have to depend a great deal upon what counsel on either side state to be the facts from their respective points of view, and counsel has stated what appears to me to be a sufficient reason why I should allow the plaintiff to have discovery and inspection of documents before the delivery of his statement of claim. If the facts as stated by him are correct, it is highly important that the plaintiff should have discovery and inspection of documents before delivery of his statement of claim. Counsel themselves very often cannot possibly say whether the facts stated in their instructions are true or not, and I can only form my judgment as to what should be allowed from the instructions which they say they have received.

(*a*) [1898] 23 V.L.R. 646.

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There will be an order for discovery and inspection of documents by the plaintiff before the delivery of a statement of claim.

Order accordingly.

Solicitors for the plaintiff: *Harwood & Pincott.*

Solicitors for the defendants: *Gillott, Bates, & Moir.*

H. I. C.

F.C.

1903 *June* 1, 2, 3, 4, 26.

NIVEN *and Another v.* GRANT *and Others.*

Bankruptcy—The English Bankruptcy Act 1883, 46 *&* 47 *Vict., c.* 52, *s.* 118—*Trustees under English bankruptcy—Right to sue in Victoria*—13 *Eliz., c.* 5—"*Goods and chattels*"—*Debentures.*

Where property of an English bankrupt has become vested in his trustees in England, the title of such trustees must receive recognition in colonial courts, and no order or request from the English court is necessary to enable the trustees to sue in Victoria to recover the Victorian property of the bankrupt.

Debentures are included in the term "goods and chattels" in 13 Eliz., c. 5.

APPEAL from judgment of Williams, J. (28 V.L.R. 639).

The plaintiffs Niven and Smith, trustees under the bankruptcy of Charles Clayton, sued Alex. Grant, and F. E. Grant (in his individual capacity and as an executor and trustee of the will of Annie Clayton, deceased) and W. R. Burrough (as an executor and trustee of the said will). F. E. Grant appeared in his individual capacity and also as executor and trustee. Charles Clayton had been adjudicated bankrupt in England, and the plaintiffs were the English trustees, and the Board of Trade had given its certificate that the plaintiffs had been duly approved of and appointed as trustees of the property of Clayton, and that his property had vested in them. The claim set out that Clayton in 1893 was the holder of certain shares in the Commercial Bank and other banks, and that he was the owner of a number of municipal debentures and of a piece of land; that by an instrument of transfer registered 2nd February 1893 Clayton transferred the land to his wife, Annie Clayton, as if in consideration of 150*l.*, but none of the said consideration was in fact paid; that by transfer in March 1893

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Clayton transferred certain of the shares to his wife as if in consideration of 5*l.*, but none of such consideration was paid. Similarly as to the other shares and debentures allegations were made that Clayton transferred the same to his wife without consideration in 1893. There was an allegation that the banks had stopped payment, and calls had been made, and new shares allotted. It was also alleged that Clayton went to England with his wife in 1893. Paragraph 16 of the claim was as follows:—"The transfers referred to were made by Charles Clayton fraudulently and with intent to hinder defeat and defraud his creditors and to prevent the property transferred from being available to meet the claims of the said banks if and when the banks should stop payment." Paragraph 17 alleged—"In the alternative the plaintiffs say that the property so transferred was transferred to the said Annie Clayton in trust for the said Charles Clayton and to be held or disposed of as he should direct." The claim then stated that Annie Clayton had died, and that the defendants F. E. Grant and W. R. Burrough were her executors and trustees. On the 14th February 1901 a receiving order was made in England for the protection of all the estate real and personal of the said Charles Clayton, and on the 13th June 1901 the said Charles Clayton was adjudged bankrupt, and the plaintiffs duly appointed trustees as above stated.

The defendants A. Grant and F. E. Grant put in a defence dealing with various points raised, but the one paragraph material to this report was paragraph 24, which was as follows:—"They will object that the trustees under the English bankruptcy are not entitled to bring this action in the State of Victoria, because—(*a*) The Imperial Legislature has no power to make laws such as the *Bankruptcy Act* 1883 in and for Victoria in respect of property in Victoria of the nature sued for or in respect of transfers thereof made by Victorian citizens prior to bankruptcy, inasmuch as such Legislature has delegated such powers to the Victorian Legislature, and the Victorian Legislature has dealt with the same. (*b*) The part of the said *Bankruptcy Act* material to this action does not apply to this colony. (*c*) If the said English Act does vest Victorian property in them

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it gives the Victorian Court no jurisdiction to deal therewith until the right thereto has been legally established in England or the aid of this Court has been sought under sec. 118 of that Act. (*d*) At the time of the alleged transfers the English Bankruptcy Court had no power to deal with the estate or person of the said Charles Clayton."

The defence of F. E. Grant and W. R. Burrough, as executors and trustees, was, in paragraph 24, so far as it is material to this report, as follows:—"They will contend that the plaintiffs, even if they are the trustees of the bankrupt estate of the said Charles Clayton, and even if the said Charles Clayton was the husband of the said Annie Clayton, and even if the said property claimed by them in this action was given by the said Charles Clayton to the said Annie Clayton, as alleged in the statement of claim, are not entitled to maintain this action, but that if they have any claim in the premises they should have proceeded under sec. 11 of the *English Bankruptcy Act* 1883."

The order setting down the points of law for argument directed "that the points of law raised by the defendants in paragraph 24 of the respective defences be set down for hearing and disposed of by a Judge before trial. . . ."

The arguments were heard before Williams, J., who decided in favour of the plaintiffs, and from this judgment the defendants now appealed.

Agg for the appellants A. Grant and F. E. Grant.

(Owing to the form in which judgment was given it has become unnecessary to report the arguments relating to the point as to the power of the English Legislature to make laws dealing with matter legislated for by the Victorian Legislature.)

Counsel's argument as to the effect of sec. 118 of the *English Bankruptcy Act* is reported in the report of the case in the court below.

Goldsmith for the appellants F. E. Grant and W. R. Burrough —The property in question is not the property of the bankrupt within the meaning of the English Act. As to the claim under the statute of Elizabeth, that statute does not apply to Victoria

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by intendment or otherwise. The Victorian Legislature has adopted it as a colonial Act, but the plaintiffs are not suing under that Act. The plaintiffs must first get judgment against the defendants before they can come as creditors to set aside the transfers under 13 Eliz., c. 5. The Victorian Act applies only to dealings in Victoria with Victorian property, and the plaintiffs cannot, as the case stands at present, set aside those dealings by virtue of the English Act 13 Eliz., c. 5. The property sought to be recovered is not property within the meaning of 13 Eliz., c. 5. "Goods and chattels" do not include choses in action: *Colonial Bank* v. *Whinney* (*a*); *Dundas* v. *Dutens* (*b*); *Groven* v. *Cooke* (*c*). Therefore Bank shares and debentures are not within the statute.

Higgins and *Cussen* for the respondents—It is not necessary for the plaintiffs first to get judgment before proceeding to set aside the transfers under 13 Eliz., c. 5. The statute declares that such transfers are void as against creditors, and the plaintiffs represent the creditors, and can move to set aside the transfers made in Victoria: *Delaney* v. *Merry & Son* (*d*); *Shears* v. *Rogers* (*e*).

The shares and debentures come within the term "goods and chattels," because the Sheriff is now empowered under a writ of *fi. fa.* to seize and sue upon bills of exchange and other securities for money belonging to the debtor: *Warden* v. *Jones* (*f*); *Barrack* v. *McCulloch* (*g*); *Reese River Silver Mining Co.* v. *Attewell* (*h*).

Agg and *Goldsmith* in reply.

Cur. adv. vult.

MADDEN, C.J. I have had the advantage of reading the judgments of my learned brethren, and I entirely concur in the substance of both. I have had a longer opportunity of reading

(*a*) [1885] 30 Ch. D. 261; [1886] 11 App. Cas. 426.
(*b*) [1790] 1 Ves. 196.
(*c*) [1812] 2 Ball & Weat. 230.
(*d*) [1901] 1 Q.B. 536.
(*e*) [1832] 3 B. & Ad. 362.
(*f*) [1857] 2 De G. & J. 86.
(*g*) [1856] 3 K. & J. 110.
(*h*) [1869] L.R. 7 Eq. 347.

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that of my brother Hood, and I entirely agree with it. As to the question of pleading, I fully concur in both judgments.

HOLROYD, J., read the following judgment:—In my opinion this appeal should be dismissed. The points of law set down to be heard and disposed of by the Judge before trial were those raised by the defendants Alexander Grant and Frederic Elliott Grant in the 24th paragraph of their defence, and by the said Frederic Elliott Grant and William Robert Burrough in the 24th paragraph of their defence. It may be disputable whether it is good policy, when several points of law are raised by the pleadings, to permit one or more of them to be argued before the trial, unless all the others are dealt with at the same hearing. I shall assume for the present purpose that, under Rules 2 and 3 of Order XXV., the separate discussion of any one or more of several points of law is permissible; but I must call attention to an important consequence which, it seems to me, must follow logically from allowing it. In the argument of the point or points set down, not only must all the facts alleged in the pleading which is attacked be accepted as true, but it must be taken for granted that on all other points that pleading is unassailable. In the 24th paragraph of their defence, Alexander Grant and Frederic Elliott Grant maintain that the trustees under the English bankruptcy of Charles Clayton are not entitled to bring this action in Victoria for four reasons which they set out. My short answer to this contention, and to all the reasons advanced to support it, is that Charles Clayton was adjudged bankrupt in England under the *Bankruptcy Act* 1883, that the plaintiffs were duly appointed trustees of his property, that by virtue of their appointment all the property of every description, real or personal, whether situate in England or elsewhere, which belonged to Clayton at the commencement of his bankruptcy, became vested in them (46 & 47 Vict., c. 52, sec. 20, sub-sec. 1; sec. 50, sub-secs. 3 and 5; sec. 54, sub-secs. 2 and 3; sec. 168, term "Property"); that their title must receive recognition in the colonial courts, as once again quite recently determined by the Privy Council—*Morrison* v. *New Zealand Loan and Mercantile Agency Co. Ltd.* (*i*); that this action was

(*i*) [1898] A. C. 358, per Lord Davey.

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brought to recover property which at the commencement of the bankruptcy, so it was asserted, did according to the law of Victoria belong to the bankrupt; and that no order or request from any English court is required to enable the trustees to sue. Recognize the trustees' title, and Mr. Agg's reasons become meaningless. The paramount authority of the British Parliament is incontestable; but I should be disposed to go further, and lay it down that this Court, if unconstrained by any express enactment, ought, on the principle of international comity only, to recognize the title of trustees of an English bankrupt to property recoverable here whenever no previous insolvency of the bankrupt in this country interposed.

The 24th paragraph of the defence of Frederic Elliott Grant and William Robert Burrough is a little ambiguous, but only means, I think, that some steps should have been taken under the English Act of 1883 before a suit could lawfully be instituted by the plaintiffs in this State—that is to say, it sets up as an obstacle counsel's third reason, which I have already disposed of. There are several other points of law brought forward in the two defences, notably one regarding the interpretation of the Statute 13 Elizabeth, c. 5, on which possibly the plaintiffs may be defeated. With these, as already indicated, we are really not at present concerned. But should I be wrong in this, I am prepared to hold that a good cause of action under the Statute is disclosed in the Statement of claim. In the first place, one of the instruments impeached as made by Clayton fraudulently with intent to hinder and defeat his creditors is a transfer of land. Secondly, it was held long ago that the expression "goods and chattels" in the Statute of 13 Elizabeth, c. 5, included all personal estate which could be lawfully seized by the Sheriff under an execution issued against the debtor; and, since the Sheriff has been empowered under a writ of *fi. fa.* directed to him to seize and sue upon the bills of exchange, promissory notes, bonds, and other securities for money belonging to the debtor in satisfaction of the writ, it has been considered that the words "goods and chattels" in the Statute must be interpreted to comprise such securities. Debentures are, in my opinion, securities for money; and the debentures alleged to

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have been transferred by Clayton to his wife with the lik fraudulent intent must therefore be covered by the expressio "goods and chattels" in the statute referred to.

Before concluding, I desire to call attention to the anomalou mode of pleading with which this appeal has made u acquainted; not because it has in any way influenced m judgment, but because, if apparently sanctioned by the Court, might lead to serious inconvenience and much injustice. Th defendant Frederic Elliott Grant, being sued in a du capacity, has thought proper, presumably under the advice counsel, to divide himself into two personages, and has joined each of two separate defences delivered by the other defendan If this method were approved, any man could do for himse what was done here by joining with others. To a defenda trustee, who had placed himself in a position in which h personal interest collided with his fiduciary duty, what a hap means it would afford of escaping from his dilemma. By putti in separate defences as individual and as trustee, and instructi counsel to appear for him in each capacity, he might possib succeed in upholding against the plaintiff a personal right of h own which he ought to have subordinated to that of his c defendants, and in obtaining two sets of costs—one from t plaintiff whom he had defeated, and the other from the esta of his *cestuis que trustent*, whom he had, though unsuccessful defended in obedience to the obligation imposed upon him his duty. Appeal dismissed, with costs.

HOOD, J., read the following judgment:—The defendan have raised a point of law under Order XXV., r. 2, to the effe that the plaintiffs, as trustees under an English bankruptcy, a not entitled to maintain this action. That means that, even all the facts set out in the statement of claim were proved, st the plaintiffs could not succeed. If, therefore, there is any cau of action alleged in the statement of claim, the defendants mu fail.

Several grounds are given in support of the defendan objection, but in my opinion none can be supported, for they a all founded upon the erroneous supposition that the plaintif

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case is entirely based upon the *English Bankruptcy Acts*, when in reality those Acts have very little to do with the matter.

The plaintiffs are the trustees of the estate of one Clayton, bankrupt in England. They allege that certain transfers of his property were made with intent to hinder, defeat, and defraud his creditors, and are therefore fraudulent and void within the Statute 13 Elizabeth, c. 5. That Statute is in force here. The defendants reside here. The transfers were made here, and the property is here. The only question left is whether or not the plaintiffs, as trustees, can sue here. By the Statute such transfers are void against the creditors of the transferror, and it is clear that, if the creditors or some one or more, on behalf of all, had instituted this action, they could have maintained it, supposing they proved the statements alleged. All the property of an English bankrupt, real and personal, in the colonies as well as in the United Kingdom, is vested in the English trustee: *New Zealand Loan Co.* v. *Morrison* (*k*); *Federal Bank* v. *White* (*l*). This being so, he must necessarily represent the creditors here as well as in England, there being no local insolvency, as the bankruptcy law puts the trustee in the position of the representative of all the creditors of the bankrupt: *Ex parte Butters* (*m*). These trustees, therefore, in whom all the property of Clayton vested, and who are the only persons who can represent all his creditors, are applying to this Court for a declaration that, according to our own law, certain transactions are void, and I can see no reason for saying that they cannot do so. This is apart from the wider question as to how far the property in dispute can be said to be property of the bankrupt vesting in the trustees, for the recovery of which they are entitled to sue, and I think a great deal can be urged in favour of this view—*Shears* v. *Rogers* (*n*)—the statute saying that such transfers shall be "clearly and utterly void frustrate and of none effect," there being no intervening rights of innocent parties. A great deal of argument turned upon the meaning of sec. 118 of the *Bankruptcy Act*. In my opinion that section has nothing whatever to do with the present question.

(*k*) [1898] A.C., at p. 358.
(*l*) [1895] 21 V.L.R. 451.
(*m*) [1880] 14 Ch. D., at p. 267.
(*n*) [1852] 3 B. & Ad. 632.

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It merely creates a mode by which Courts having jurisdiction i bankruptcy or insolvency within the British dominions ma assist one another in enforcing their respective orders an warrants. There is no authority in that section, nor indeed i any other, for the proposition that the plaintiffs must fir establish their right in England, or must obtain a request in a from the Court in Bankruptcy to this Court, under sec. 11 before suing here. They come here as independent suito claiming a right independent of the English Bankruptcy Cou or of any proceedings therein, just as in the same way as the might proceed in the Chancery Division of the High Court England.

Reliance was also placed upon the provisions of sec. 57 of t *Bankruptcy Act* 1883. That section provides that the trust may, with the permission of the committee of inspection, certain things amongst others bring any action relating to t property of the bankrupt, and it was contended that the stat ment of claim is bad for not alleging that such permission h been given. I do not think that this objection is covered by t pleadings, but even if it is I do not agree with it. In the fi place, I think that the absence of permission to bring the acti would not afford a defence. It is a collateral matter foreign the real subject in dispute, and the proper way to give effect to would be by a substantive application to stay or dismiss t action. Then, again, if it be a defence, it is for the defendants plead it. There are no negative words in the section, and nothi to make this permission a condition precedent; but even if the were, then, by Order XIX., r. 14, the burden lies on t defendants to specify in their pleadings the non-performance such condition.

It was further urged that some of the property sued for not within the Statute of Elizabeth. I am inclined to thin that the whole of it is within the Statute, but it is not necessa to so decide, inasmuch as the action is maintainable if any the property is within the Statute, and some clearly is.

Even if the defendant's objections relating to the *Engli Bankuptcy Act* were in point, I am not at present convinc that they are of any force. I agree with what my broth

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Holroyd has said in regard to the pleadings, and to the practice under Order XXV., r. 2.

Solicitor for appellants A. Grant and F. E. Grant: *Brahe & Gair.*

Solicitor for appellants F. E. Grant and Burrough: *Ralph.*

Solicitors for respondents: *Davies & Campbell.*

W. H. M.

[IN CHAMBERS.]

MADDEN, C.J.
1903
May 5.

In re A. B. (*a Solicitor*); *Ex parte* DAVIES.

Costs—Bill of costs—Right of client to demand bill of costs.

A client is entitled as of right to ask for and obtain a bill of costs from his solicitor without any condition being attached to such delivery as to the bill being taxed.

A solicitor, upon being asked by his client the amount of costs chargeable in respect of work done, informed him that the costs were about 40*l.*, and would probably tax at a higher sum, and said that if the client chose to pay a smaller sum, naming it, and would waive taxation, he would take such smaller sum in satisfaction. The client agreed to this, and paid the amount suggested. Some months afterwards, the relationship of solicitor and client having ceased, the client demanded the delivery of a bill of costs, and the solicitor said he would deliver one on condition that such bill were taxed and the difference paid. The client demanded the delivery of the bill unconditionally.

Held, that the client was entitled as of right to have a bill of costs delivered unconditionally.

THIS was a summons on behalf of one Davies for an order directing the delivery of a bill of costs by his former solicitors.

It appeared that Davies had employed a firm of solicitors to do certain work for him, and upon the completion of the work he called at the solicitor's office and asked what the costs would be. After looking at his books the solicitor said it would be at least 40*l.*, and would probably tax at a greater amount, but if taxation were waived he would be content if the client paid 35*l.* The client asked which course the solicitor would advise, and was at once told that he could not be advised upon such a matter, and it was entirely within his own discretion which course he would adopt. The client thereupon paid the sum suggested. Some months afterwards, when he had ceased to do

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business with the solicitors, and after some disagreement ha arisen, he wrote demanding a bill of costs in respect of the wor for which he had paid. The solicitors offered to deliver the bi upon being paid the costs of preparing the same, and upon th being refused offered to deliver the bill conditionally upon th client having the same taxed, and paying the difference betwe the taxed amount and the sum already paid. The clie demanded delivery of the bill unconditionally, and upon th being refused took out this summons.

Kilpatrick in support of the application—The client is entitl of right to the delivery of a bill of costs unless there is express written agreement to take a lump sum. He need n have the bill taxed; he is under no obligation to do anythi with the bill when he has got it. The point was practical decided in the case of *In re Blackmore* (*a*), a case which h been recognized in *In re West* (*b*).

(Counsel was stopped.)

Starke to oppose—The granting of the order is in t discretion of the Judge. If a client, having paid for the wo done and waived the delivery of a bill, came to the Court twen years afterwards, the application would not be entertain Where there is no suggestion of overcharge, and no imputati of the bargain being unfair, a solicitor should not be put to t trouble and expense of making out and delivering a bill of cos If no use is to be made of the bill when delivered, then it merely imposing a hardship for no purpose upon the solicit Some condition should be attached to any order made und such circumstances, unless there is some suggestion of unfa ness.

MADDEN, C.J. It appears in this matter that some frictio has arisen between the solicitors and their former client, a after some correspondence the solicitors refused to deliver a b of costs in respect of the business for which they had receiv payment. I think there was no ground for such refusal.

(*a*) [1851] 13 Beav. 154. (*b*) [1892] 2 Q.B. 102.

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is clear that there is no imputation upon them. The principle of law and practice is that in every case where there is no distinct contract in writing for a lump sum between solicitor and client, the client has within a certain period the *right* to ask for and to obtain a bill of costs. It would be most unfortunate if it were otherwise, and solicitors would have to rest under many imputations of overcharging, which, it would be said, the Court refused to allow to be considered or investigated. In cases such as this, where within a short time after the severance of the relationship of solicitor and client the client asks for a bill of costs he is entitled to have it, although he may never intend to have it taxed, and although the account may have been already settled, on the footing of a statement made by the solicitor. It may sometimes work a hardship upon solicitors. There was in this case a sort of bargain between them that the solicitor would take less than he said his charges would come to if the making up of the bill of costs were waived. The client agreed to this course and paid the money as suggested, and no bill of costs was delivered. Some months afterwards the client asks for a bill of costs, and the cases cited show that he is entitled to it, and that, too, without any condition as to his right. It may be that on investigation he will find that the charges were too great, and find some item which he will dispute, and if he likes he may have it taxed. On the contrary, it may turn out that the amount charged was most reasonable, and he may not choose to have it taxed. That is a hardship upon the solicitor, but it must be borne. I must make the order directing a bill of costs to be delivered. In this case, as the client does not attempt to deny the conversation which the solicitor says took place as to the costs, and as a sort of bargain was arrived at, and as there is no suggestion that the client has discovered something which he did not then know, and as there is not the slightest ground for imputing dishonesty to the solicitor, it would be unfair that the client should ask for the bill of costs for no purpose at all, and, therefore, I think it right to add these terms to the order. If the bill, having been delivered, is taken to taxation, and the client succeeds in taking off more than one-sixth of the bill, he will have the costs

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of this application, which I fix at 3*l.* 3*s.*, together with the costs of the taxation, but if he does not proceed to taxation, or does not tax off such one-sixth, he will have no costs at all.

Application allowed accordingly.

Solicitors for client: *Malleson, England & Stewart.*
Solicitors for solicitors: *Dobson & Weigall.*

W. H. M.

MADDEN, C.J.

1903 *May*

[IN CHAMBERS.]

In re JAMES McEWAN AND CO. LIMITED.

Costs—Taxation—Bill of costs—"Instructions for brief"—Two counsel, allowance of in motions.

On a motion to the Court the taxing officer may in his discretion allow the fees of two or more counsel.

There is no practice of the Court to disallow fees to two counsel on a motion to the Court. Head-note to *Baxter* v. *Hill & Christie* ([1896] 18 A.L.T. 33) disapproved of.

The item "instructions for brief" is allowable on taxation as between party and party in a proceeding by way of motion to the Court.

REVIEW OF TAXATION.

This was a summons on behalf of James McEwan and Co. Limited and Walter H. Serle for an order that certain objections of the applicants to the taxation of costs might be allowed. An action had been commenced by the Welsbach Light Co. of Australasia Limited against Robert Lascelles, claiming damages for an alleged infringement of a patent and for other relief. While the action was pending, the defendant Lascelles applied on motion to the Court for an order that a writ or commission of sequestration might issue to sequestrate all the property and effects real and personal of the plaintiff company and of James McEwan and Co. for the contempt of such corporations in publishing a certain advertisement since the commencement of the action, and also that Walter H. Serle and others named in the notice of motion might be committed to the Melbourne Gaol for their and each of their contempt in publishing or assisting in

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publishing the same advertisement. The defendant asked also for a writ of attachment against Serle and others, and for an injunction.

The application was headed in the action and "In the matter of an application against the plaintiff company and James McEwan and Co., Walter H. Serle, the manager and receiver of the last-named company, R. J. Sime, and J. M. Finlayson for an alleged contempt." The advertisements complained of appeared in three different papers. Upon the hearing of the motion, James McEwan and Co. and W. H. Serle appeared jointly, and were represented by two counsel. Robert Lascelles and Co. were represented by two counsel, and two counsel appeared for the Welsbach Co. The motion was heard upon affidavits, and was dismissed with costs. Upon the taxation of the bill of costs presented on behalf of James McEwan and Co. and W. H. Serle, the item "instructions for brief, 5*l.* 5*s.*" was reduced by the taxing officer to 13*s.* 4*d.*, and the fee for second counsel was disallowed altogether. The particulars of the item "instructions for brief" were as follow:—"(1) Instructions for brief, including attendances on W. H. Serle, manager and receiver of James McEwan and Co., and R. M. Smith, chairman of directors of the said company, obtaining from them facts within their own knowledge relating to the publication of the advertisement complained of, and obtaining from them information as to the company's relations and dealings with the Welsbach Co. and previous transactions between the parties, conferring as to the evidence of the actual insertion of the advertisement, and fully advising generally on company's position, and liability (if any) of Serle as receiver and as an officer of the Court. (2) Attendances on plaintiff's solicitor, conferring, and perusing and considering documents in his possession relating to the action, and on his explaining position of action and circumstances relating to the insertion of advertisement. (3) Attendance on Serle, jun., solicitor, acting on motion on behalf of Sime, conferring. (4) Further attendance on plaintiff's solicitor from time to time on his notifying dates of adjournment. (5) Looking up authorities and decisions on the matter, so as to fully instruct counsel on the questions bearing on publication of the advertise-

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ment and the liability of company as distinguished from that o receiver and manager, and considering form of procedure adopte by appellant with a view to raising objections as to method an jurisdiction, the application being of a very special and nove character. *5l. 5s.*"

The reasons given by the taxing officer were as follow:—" allowed 13*s.* 4*d.* as 'instructions for brief,' and on comparing th detailed particulars with the brief it appeared to me that suc sum was ample for such item as between party and party. Th only evidence brought before the Court was by way of affidavit and all costs in connection therewith have been charged an allowed for in the bill, such as 'instructions,' 'drawing,' an 'perusals.' Apart from these the only item that the objector appeared to me to be entitled to as 'instructions for brief' was fo perusal of the order made in the High Court of Justice, in whic Bevan & Alexander, an English company, were defendants." Th taxing officer then dealt with the first four items in the par ticulars, and as to the 5th stated:—" This is not chargeable a 'instructions for brief,' and if allowable should be considered i counsel's fee on brief, as the solicitor is not entitled to any allow ance for instructing counsel as to the law or practice in an matter coming before the Court. The allowance 'instruction for brief' is intended to cover work done in ascertaining th material facts of the case, sifting evidence, and reducing the cas to the essential matters which have to be brought befor counsel conducting the case, and in the exercise of my dis cretion I have allowed the sum of 13*s.* 4*d.* therefor in thi matter, on the principle 'that costs chargeable under a taxatio as between party and party are all that are necessary t enable the adverse party to conduct the litigation and n more. Any charges merely for conducting litigation mor conveniently may be called luxuries, and must be paid by th party conducting them:' Per Malin, V.C., *Smith* v. *Butler* (*a*) I have in the exercise of my discretion disallowed second counsel and brief thereto, on the ground that there did no appear to be any special reason for the feeing of second counsel upon a motion of this nature: *Boswell* v. *Coaks* (*b*); *Baxter* v.

(*a*) [1875] L.R. 19 Eq., p. 475. (*b*) [1887] 36 Ch. D. 444.

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Hill (c). The latter case was one where the liberty of the subject was involved, being an application by the defendant Christie to set aside an order for a *capias* and the writ of *capias* issued thereunder. I have, therefore, on the grounds stated, disallowed all the objections."

W. H. Moule in support of the summons—The taxing officer has admitted that an allowance for "instructions for brief" should be made, but he has wholly misconceived the nature of such an allowance. The drawing of an affidavit is one thing, the obtaining information for the purpose of such affidavit is quite another thing. (Counsel dealt with the various items.) The present applicants were not parties to the action, and therefore the motion, so far as they were concerned, was an originating motion, and the item "instructions for brief" is permissible. As to the employment of second counsel, the taxing officer's reasons are ambiguous, and if he exercised his discretion such discretion cannot be reviewed, but he has been misled by the head-note to *Baxter* v. *Hill & Christie* (d), where it is said that the practice of the Court is not to allow briefs to two counsel in a taxation of costs between party and party of a motion to the Court. There is no such practice, and the judgment in that case does not so decide.

[MADDEN, C.J. Certainly I never intended to lay down such a practice, and no such practice exists.]

It was held in *Mutual Store Limited* v. *Langton* (e) that even in an application in Chambers the taxing officer has a discretion to allow for more than one counsel.

Starke to oppose—As to the allowance for two counsel, that is purely a matter for the discretion of the officer, and he says that in the exercise of his discretion he has disallowed second counsel.

[MADDEN, C.J. I will ascertain from the taxing officer how he has dealt with this item, as the reasons given are not clear.]

As to the item "instructions for brief," that cannot be

(c) 18 A.L.T. 33. (d) 18 A.L.T. 33.
(e) [1897] 18 A.L.T. 167.

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allowed for at all; the item is not allowed in an originating summons—*In re Hill* (*f*)—and cannot be allowed on a motion to the Court. At any rate, the only fee is the scale fee, 13*s.* 4*d.*, which has been allowed.

MADDEN, C.J. Although these proceedings were by way of motion to the Court, and not a trial, the practice seems to be recognized that the item "instructions for brief" should be allowed for, and I gather that especially from the fact that the taxing officer has himself allowed the sum of 13*s.* 4*d.*

I can also understand that here there is a reason, inasmuch as this is not merely a collateral proceeding in this action, but something extrinsic, and outside the matter of the action, and I can suppose that the practice is to allow such a class of item. Starting with that, and assuming that it was right to allow instructions for a brief at all, it appears to me that the officer has excluded too much from his consideration in allowing some instructions for brief. He says that as to further particulars—No. 1—that matter had been already allowed for in the instructions for Serle's affidavit. Apparently he thinks that because in those instructions for affidavit Serle had given information, that the fresh information given by Serle and Murray Smith and others—(His Honor read the particulars)—exhausted all the allowance for that item. He seems to have excluded a great deal of matter which I should suppose was important for these parties to know in this particular proceeding in order that they should be able to advise and consider what way they should shape their evidence and their defence. I think it is not sufficient to say as to No. 1 that, because instructions for Serle's affidavit were taken separately, that therefore the other matters indicated in No. 1 should be excluded, and that therefore the allowance that he has made should satisfy the whole charge. I do not think that is sufficient. If there was a *bonâ fide* interview between these persons, and a *bonâ fide* study of the case, a further allowance should be made. The taxing officer has distinctly stated what should constitute an allowance for instructions for brief. (His Honor read the

(*f*) [1899] 24 V.L.R. 918.

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taxing officer's reasons as to what constitutes instructions for brief.) I think that that is right, but a person who undertakes the defence of parties in proceedings of this kind ought to closely and anxiously consider his position. He should exactly ascertain what the defence should be, and get whatever information is possible, and anything he gets for that purpose if it is in fact obtained should be considered in the item "instructions for the brief." He gets affidavits from the other side; he must closely examine them and peruse them, and see how far he may resist them. He has to see how far his two clients may differ, and in what they may agree. He should consider every paragraph, and has to consider his case with reference to the case raised by the other side; he has got to turn them over to counsel and examine them, and when in doubt he should get information from those who may contradict the case set up by the other side, or tell him the true position of the case; this has all to be done to prepare him to make affidavits. What is said in reference to No. 1 may be said as to the others. The particulars in Nos. 1, 2, and 3 are legitimate inquiries into the case. Two parties are assailed. The attendance on plaintiff's solicitors should be allowed. The plaintiff was a person who was bringing an action against the defendants, and he might have very important and valuable documents in his possession in relation to this extrinsic and foreign proceeding, and I think it was a very proper course to take if the work was done, and an appropriate allowance might well be made for that.

Then the attendance on John Serle, jun., solicitor for Sime, who was an officer in the company's employment. I think that that would be a wise and judicious course to take—to attend and see what he had to say about the matter, and what was actually done. I think that is a proper subject for allowance. As to item No. 4, the taxing officer thought that that was not proper. I think so too. As to No. 5, looking up the authorities, etc., I think that that is all justifiable. I think a solicitor who is called upon suddenly to prepare the defence of persons assailed in this kind of proceeding ought, not merely may—but ought—to specially inform themselves as to the case.

This is not a proceeding in which he might be expected to

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have all the authorities at his fingers' ends, and I think it would be wise and proper to look into the cases, and I think in cases of this kind, where different proceedings are being taken against the individual and against the company, the solicitor would be entitled to investigate that matter, in order to justify him in the course he would take in drawing up the affidavits. It would be too narrow a view to say that a solicitor should not look into the authorities governing a case of this kind with the view of looking into the mode in which he should shape his case. The costs of extra work of this nature is taken into consideration when an order has to be made whether costs should be allowed on the higher or lower scale, but the ordinary costs of such work are not to be excluded. I think it right to say that a solicitor may be allowed for the trouble and work of looking into the law to refresh his mind or to ascertain what form the defence should take. The defendant initiates this class of attack, and it is only fair that he should pay for the special preparation the other side had to make. It all depends upon how much was necessary and what was really done. That would be for the consideration of the taxing officer. Here he has taken altogether too narrow a view on the grounds he has presented to me, and which seem to have actuated his mind. I do not think the reasons he has given so far as No. 5 is concerned at all dispose of the particulars given. The reasons are too narrow altogether, except as to No. 4. I think the allowance he has made as to the other items he has marked altogether too small—clearly too small if my view is right. He has allowed 13*s.* 4*d.* for perusing the order—(reads the reasons)—of some English proceeding; apparently that is the subject matter which has been allowed for. I think, therefore, he has improperly excluded the other matter, and the amount allowed is too small. I think the whole proceedings formed a special operation of the law, and that the officer should have allowed more than 13*s.* 4*d.* The instructions for Serle's affidavit, which has been allowed, is one thing, but the obtaining the information from Serle and considering such information is another thing, and the latter should certainly be allowed for.

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As to the other matter, the number of counsel, I should say that the rule is that there may be as many counsel as desired in any case, even in a summons in Chambers, and they *may* all be properly allowed. There is no principle on which the Court disallows, as a matter of course, any number of counsel. In one class of case one may be considered enough, in others more. The officer is at large to allow for as many counsel as may be necessary to the proceedings. It is in his discretion to say whether in any given case one, two, or three counsel should be allowed for. If after considering the class of case he thinks one would have been sufficient, then one only should be allowed for. But if he says that it is the practice of the Court to disallow for more than one he is wrong. In the case of *Baxter* v. *Christie* one counsel only was allowed, and rightly too, because that was a very ordinary application, of frequent occurrence, in which one counsel only appears as a general rule, and only one is necessary. In that case I think the officer was right, but in my judgment in that case I never laid down the principle that in motions of any kind it would not be proper to allow for more than one counsel. I quite agree with the observations of my brother A'Beckett in the case cited by Mr. Moule. However, I will ask the officer as to how he has exercised his discretion on this matter before I make any order. I will allow the application as to the instructions for brief, and will remit that item to the officer for reconsideration. The other item I will decide according to the answer I receive from the taxing officer.

Leave to appeal refused.

Upon a subsequent day His Honor intimated that the taxing officer had informed him that he had exercised his discretion as to the allowance of two counsel.

The summons was therefore allowed as to the item "instructions for brief," and disallowed upon the other item.

Solicitors for applicant: *Moule, Hamilton & Kiddle.*
Solicitor for respondent: *C. J. McFarlane.*

W. H. M.

[Subsequently an application was made to Hood, J., to review

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the taxation of costs of the plaintiff in the same action. The same items were under review, but the reasons given by the taxing officer were not identical with those set out in the report above. As to the item "instructions for brief," which the taxing officer had allowed as before at the sum of 13*s.* 4*d.*, he said that he had exercised his discretion in connection with this item, and in his opinion 13*s.* 4*d.* was sufficient for the work done. The plaintiff had furnished full particulars of the work, and had verified the same by affidavit.

F. Gavan Duffy, K.C., and *Cussen* for the plaintiff.

Starke for the defendant.

HOOD, J. I regret that as regards the first point—the allowance of two counsel—I cannot see my way to interfere. For my own part I think two counsel should have been employed, and the parties were justified in what they did. However, the general rule is undoubtedly that the taxing officer has a discretion in such a matter, and the Court should not interfere unless satisfied that that discretion has been exercised upon a wrong principle, and that there has been plainly and clearly an error. I am not prepared to say that that was the case here. As to the second item "instructions for brief," I am somewhat puzzled because I am not clear what the taxing officer means by "exercising his discretion." If, as counsel for defendant says, he disbelieved the plaintiff's affidavit, he should have said so. It is not sufficient to say merely "I have exercised my discretion;" he should say whether he disbelieved the affidavit, or that the work was not in fact done. He should state these things in so many words. (His Honor then dealt with the particulars, and said that he would remit this item back to the taxing officer.)

Solicitors for plaintiff: *Finlayson & Hodgson.*
Solicitor for defendant: *C. J. McFarlane.*

W. H. M.]

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[IN CHAMBERS.]

A'BECKETT, J.

1903
June 16.

TUCKER *v.* MULLIGAN.

ts—Taxation—Bill of costs—Proceedings before Chief Clerk—Allowance of two counsel—Increased fees—Attendance of plaintiff as witness, allowance for—Instructions for brief—"Rules of Supreme Court 1900*"—Order LXV., r.* 28.

In proceedings before the Chief Clerk, the allowance of two counsel, even on a ation as between solicitor and client, should not be recognized except in cases real magnitude.

Where, in proceedings before the Chief Clerk, there is a protracted inquiry tending over many days, counsel may properly be allowed increased fees, but ch increased fees must be regulated upon the same calculation as to time as reshers in an ordinary action.

A plaintiff, being the executor under the will of a person whose estate was ing claimed against upon an alleged liability as a contributor on the B list of a mpany in liquidation, will not be allowed costs of attending from day to day in e hearing of such claim before the Chief Clerk, even although he may be briefed a witness.

The item "instructions for brief" discussed.

REVIEW OF TAXATION.

This was a summons to review the taxation of a bill of osts taken out by the liquidator of the Federal Bank in the ction of *Tucker* v. *Mulligan*. The plaintiff was the executor f the will of D. Ahearn, and had instituted an action for the dministration of the estate. The matter was referred to the hief Clerk, and the usual advertisements for creditors to send claims appeared. The liquidator of the Federal Bank had nt in a claim against the estate, claiming in respect of a ability for a proposed call upon the contributories of the bank, hich was in liquidation. Ahearn had been settled on the B st of contributories. The facts of the case are fully set out in e report of the case in vol. 28 V.L.R. 1.

When the action came on for further consideration the laintiff Tucker was allowed his costs as between solicitor and lient. His solicitor sent in his bill for 528*l.*, which the taxing fficer allowed at 461*l.* The plaintiff had distributed portion of he estate, being allowed so to do upon retaining funds to meet his particular claim and the costs and charges. The liquidator bjected to the following items :—

"Instructions for brief," charged at 125*l.* and allowed at

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78*l.*; the ground of this objection being that the amount allowed was excessive.

"Paid F. J. Tucker" (the plaintiff), "barrister-at-law, nine days, 9*l.* 9*s.*," the ground of objection being that Mr. Tucker was not called as a witness, nor was it shown that he could have given any evidence, and this charge should not be allowed merely for superintendence.

Then followed an objection to two refreshers, and attendances making same on senior and junior counsel. The bill was amended, claiming these allowances as "increased fees." The objection was that "These refreshers were not earned, and there was no power to allow an increased fee. The amounts allowed are also excessive. Further, that the taxing officer has discretion to allow one counsel only, which discretion he has not exercised." A dispute arose as to this last clause of the objection, as to whether it amounted to an objection to second counsel being allowed at all. This was referred by the Judge to the taxing officer.

The last items objected to were a series of charges for furnishing copies of counsel's shorthand notes to the defendant beneficiaries under the will who were attending the proceedings at their own risk, and who were subsequently not allowed any costs for so attending.

The proceedings before the Chief Clerk occupied 28½ hours spread over nine days. Evidence was taken *vivâ voce.* Eight refreshers had been allowed by the taxing officer, or as the claim was amended an increase of fees was allowed for each attendance of counsel on eight days. It appeared that the defendant had claimed and been allowed three refreshers only.

The following were the reasons stated by the taxing officer:—"This was an action by way of originating summons by F. J. Tucker, a barrister and solicitor of the Supreme Court, as executor of the will of Daniel Ahern, deceased, against Mulligan and others. The judgment directed the plaintiff's costs to be taxed as between solicitor and client. The plaintiff claimed 125*l.* for 'instructions for brief,' and was allowed 75*l.* under that head. Subsequently, the Federal Bank carried in certain objections to this and other allowances, and I then required

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intiff's solicitor to furnish in full details of the item charged 'instructions for brief.' Upon a careful perusal and analysis the items claimed as instructions for brief, and after placing posite each item what seemed to me a fair and reasonable owance therefor, I found the total came to 78*l.*, and as the intiff claimed to be allowed the difference, I have so increased amount and have disallowed the objection of the bank, which peared to be an objection to *quantum*, and not merely as to particular item or items forming part of the charge. As der the new rules parties have now the right of appeal by mmons to review a taxation without being bound by the dis-tion of the taxing officer, in every instance a party supporting charge of 'instructions for brief' is required to furnish full tails of the item, and it appears to me that it may become cessary to require the objecting party to specify the reasons d grounds of his objections to any particular item or items." e taxing officer then referred to a number of cases dealing ith the point of the question of *quantum* being entirely ithin the discretion of the taxing officer, and continued:—"This eing a taxation between solicitor and client in the action, I have the exercise of my discretion allowed the plaintiff such charges appeared to me to be fair, just, and reasonable, according the nature and importance of the cause, the general conduct d costs of the proceedings, etc.: "Rules of the Supreme urt 1884," Order LXV., r. 27 (29) and (38); *Boswell* v. *aks* (*a*). The objection as to refreshers is disallowed because e allowances to counsel were by way of increased fee and t as refreshers, the trial or hearing not being upon *vivâ ce* evidence in open Court, but a hearing before the Chief erk: "Rules of Supreme Court, November 1900," Order XV., r. 27 (48). The other part of this objection relates to cond counsel. I would refer to the following cases:—*Ward* v. *oberts* (*b*), also *Mason* v. *Logan* (*c*). As to the objection as to e furnishing defendants with shorthand notes, it appears that the laintiff was informed of the request by the defendant's solicitors

(a) [1887] 36 Ch. D. 444.

(b) [1897] 23 V.L.R. 182; 19 A.L.T. 55.

(c) 6 N.S.W. W.N. 118.

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for these notes, and instructed his solicitors to supply the sam The other objection relates to the attendance of Mr. Tucke barrister-at-law, nine days at 9*l.* 9*s.* It was admitted that M Tucker was in attendance for this period, that his evidence wa briefed, and that it might have been necessary to call him. H was not called, but in accordance with the usual practice he ha been allowed 1*l.* 1*s.* per diem for attendance as a witness, alter natively as compensation for loss of time, as usually made t medical men, solicitors, etc.: *Willis* v. *Peckham* (*d*); *Severn* *Olive* (*e*). I give leave to Mr. Abraham to amend his bi altering refreshers to increased fees."

Among the further particulars of the item "instructions f brief" was an item "Instructions to obtain copy of depositio of directors of bank in the examination in the matter of t liquidation," allowed at 10*s.* "Attendances at Prothonotary fr day to day, copying evidence taken thereon by typewrite allowed at 17*l.* 6*s.* 8*d.* "Paid fees thereon, 6*l.* 10*s.*," allow at 6*l.* 10*s.* "Perusing evidence taken in Insolvency Cour allowed at 5*l.* 13*s.* 4*d.* "Perusing affidavits and order liquidation," allowed at 3*l.* 8*s.*"

W. H. Moule in support of the summons.

Hayes to oppose.

A'BECKETT, J. I hold very strong views upon a question this description, and upon a bill of costs of this magnitude. do not think that persons should be allowed to twist themsel out of the objections raised, which I think any reasona person would apply to these proceedings. There are difficul which have been raised by counsel, but I think the cannot possibly sanction such charges as these. The tax officer says he has regarded the nature of the case. Perhaps but I do not think he has considered the matter broadly. has not considered the position of the parties, or the amou of the claim, or the form in which it was made. In the first pla there is the plaintiff, an executor in charge of a fund agai

(*d*) 1 B. & B. 515. (*e*) 3 B. & B. 72.

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ich a claim is made. The first stages presented no difficulty; was all plain sailing; the only difficulty was the question ether a certain claim should be allowed against the estate or t. As to the originating summons, or rather the action itself, ere was no difficulty, not the faintest reason for special sts and special attendances, etc. Then the taxing officer ds that to resist a claim of 500*l.* a bill is sent in for 8*l.* Of course it is recognized that some costs must be curred, but he should consider closely the position of the icitor with reference to them, and consider broadly is such a mand for costs justifiable under the circumstances. Then I ink it is material to consider that this executor was not what hould call—or at any rate he should not have been—a litigant king every possible means to defeat a claim which was or ght be a perfectly just claim; he should not have resorted to manner of modes of making costs in his effort to assert his n position. He is supposed merely to take proper precautions preserve the estate, which does not belong to him, from being njustly depleted. That is his position. I think, too, in ference to the expenditure which has been incurred in that spect, some regard should be paid to the amount which was at ake. It could not be pretended that, if the claim had been futed, these costs could have been got from the other side. ose interested in the estate would have had to pay heavily. hen this claim is to be considered there appears to begin a most ofuse expenditure in relation to the matter; it is true that the ll is presented for taxation as between solicitor and client, and pposing these charges were sought to be enforced in an action Abraham against Tucker, the position of the latter might such that he could not resist the claim. If, for instance, e solicitor went to his client and said there was most valuable formation contained in some text-books which he suggested ould be copied out *in extenso*, and asked his client whether he as willing it should be done, and he had replied, "Yes, go on," he client could not afterwards complain; and so with regard to he employment of type-writers and charges for perusing, if he client assented to it all he could not be heard to contest it, nd so if the solicitor said to his client—"It would be wise to

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have three counsel in this case—what do you say?" and the client said, "Certainly," that would as between solicitor and client authorize those charges, but I do not think that that would apply in the case of charging the other side, even on the principle of solicitor and client, costs where there are persons to insist upon the charges being kept within a reasonable amount. They might perhaps have been justifiable, as I have said, as between solicitor and client. I think I must override the discretion which the taxing officer should have exercised where such discretion has been exercised at all. I make these observations with reference to the employment of two counsel principally, and I shall send this again to the taxing officer to make sure that the objection was taken as it is rather vaguely stated in the paper before me, and I give my decision upon the assumption that the employment of two counsel was objected to; I shall, subject to this, reduce the allowance to one counsel only. I think the employment of two counsel in such a case as this was altogether unjustifiable, and I think that unless there is a claim of real magnitude it is monstrous to send two counsel to the Chief Clerk's chambers to argue and examine witnesses with reference to a claim of 500*l.*, and by a trustee, incurring costs to come out of other people's pockets, it is something not to be tolerated. The assistance of a junior before the Chief Clerk is less necessary, I should say from my own experience, than in an action. Arrangements can always be made to suit the convenience of counsel. The work is broken from time to time. No doubt it is work which counsel finds troublesome, and he should be well paid for it; but it is most unreasonable and most extravagant, and looks like a means to make costs, to employ two counsel in ordinary cases before the Chief Clerk. In the present case it was a most unjustifiable expense, and it was at the expense of other people.

Then, coming to the question of the increased fees allowed to counsel, bearing in mind that I think counsel should be well paid for this troublesome class of work, still I think those extra fees complained of were excessive. Whether or not the rules as to refreshers may apply to this case, I do not think they should be allowed. At any rate there should

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not be any allowance for increased fees in the Chief Clerk's office beyond what would ordinarily be allowed as refreshers, and so those fees must come off. Then as to the item 9*l.* 9*s.*, the allowance made to Tucker, that must come off. It is said that he was briefed as a witness. Well, the solicitor could brief any and as many witnesses as he desired, but knowing the nature of this action I cannot permit this item to pass.

Then as to the item "instructions for brief," I have been referred to the new rule 28 of Order LXV., and under that I may review the item unfettered by the discretion exercised by the taxing officer. I know very well the purpose for which this rule was introduced. The taxing officer necessarily is not as well able to know the class of work required in certain classes of actions as the Judge before whom the action comes, and it was therefore deemed desirable to give the Judge some latitude in the matter. In this action the solicitor brings in a claim for 125*l.* for "instructions for brief." I have made some observations as to the kind of claim and the nature of the work done, and I recollect the facts of the case, and I think the solicitor had no right to make such a claim; he should have some regard to the amount at stake, and his efforts for his client should bear some reasonable proportion to the benefit likely to accrue to his client. Here he had a barrister-client, and not a litigant insisting upon pushing everything to extremities and putting forth every effort to resist an unjust demand. Under such circumstances the case would have presented a different appearance. Here we find a solicitor saying that 125*l.* is the right allowance, in addition to all his other costs in the action not covered by special items, for the trouble he has taken. The other side stands aghast, but, probably, familiarity with such charges takes the edge off many possible objections. The solicitor has charged for attendance at the Prothonotary's office copying evidence taken on the examination of the directors in the liquidation proceedings, and he has been allowed 17*l.* 6*s.* 8*d.* by the taxing officer. This was an examination held months before in the Insolvency Court. He charges for perusing such evidence and perusing the affidavits in relation thereto. A

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solicitor cannot charge for everything he chooses to do, whether it is distantly related to the matter in hand or not, and there is much work charged for which I think wholly unjustifiable. Having full regard to the nature of their claim, although it may be impossible to say exactly what the work is really worth, I think the amount, reduced as it is to 78*l.*, should be still further reduced, and I reduce it to 40*l.*

Then as to the items as to furnishing the defendants with copies of shorthand notes and attendances thereon, I disallow all these items: the plaintiff had no right to go to this expense at the charge of the fund. I allow the summons, with costs.

Solicitor for plaintiff: *D. S. Abraham.*
Solicitors for liquidator: *Blake & Riggall.*

W. H. M.

HODGES, J.
1903
June 29.

[IN CHAMBERS.]

In re RIDGEWAY & IRWIN.

Costs—Taxation—Attorney—Charges for non-professional work — Solicitor doing work of estate agent—Jurisdiction of taxing officer to tax—Applicability of scales of costs—"Causes and matters"—"Rules of the Supreme Court 1884 *"—Order LXV., r.* 8, *App. N.—Supreme Court Act* 1890 (*No.* 1142), *s.* 3.

A taxing officer has no jurisdiction to tax charges made in a bill of costs of an attorney for work not properly that of an attorney.

No charge as attorney can be made for work which is purely that of an estate agent.

Where a taxing officer has to tax matters not covered by Appendix N. to the "Rules of the Supreme Court 1884," he is not bound to apply the schedules of costs in that appendix.

REVIEW of taxation.

Application on the part of Mrs. Edith Wilkie for an order that the taxation of a bill of costs for 42*l.* 1*s.* 8*d.* delivered to her by Messrs. Ridgeway & Irwin be reviewed, and that the objections by her to the allowance of the several items in the said objections be allowed, and the said items disallowed.

The items objected to were of the following types:—

(*a*)	1900 Jan. 17 to Nov. 16.	To 11 attendances on McGann, receiving instalments, and calculating and receiving interest	2*l.* 15*s.*

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(*b*) Attendances on and letters to you (about 9 in all), paying you above instalments and interest ... 2*l.* 5*s.*

(*c*) May 1898 to Oct. 1901 { Numerous letters to and attendances on various mortgagors demanding and receiving instalments, and to and on Mrs. Wilkie paying same, and on brokers as to insurances, and on Mr. Lucas ... 20*l.*

The grounds and reasons for the objections were, so far as material to this report, as follow:—

(1.) The work was not professional work for which a solicitor is entitled to charge as such.

(2.) The taxing officer was wrong in deciding that he had no discretion to allow less than 6*s.* 8*d.* for the attendances charged herein.

The reasons of the taxing officer for the disallowance of the above objections were, so far as material to this report, as follow:—

Objection 1.—As a question of fact I found that Messrs. Ridgeway & Irwin had been acting as solicitors to Mrs. Wilkie prior to 17th January 1900, and were continued as such solicitors accordingly until certain disputes arose between them as to financial and other matters: *In re Coburn* (*a*).

Objection 2.—The taxing officer has no discretion to allow less than 6*s.* 8*d.* under the Judicature scale, Appendix N., for "any other necessary attendance where no other provision is made per hour." There is no such general provision in the English scale: See *Annual Practice* (1902), vol. ii., p. 207. Under the Conveyancing Scale there is a special provision that the taxing officer can for special reasons allow less than the amount fixed for an ordinary attendance (10*s.*) if it be of an extraordinarily simple nature—*In re Rowbotham, Ex parte Skinner* (*b*)—but there is no similar discretion given as to the Judicature Scale.

Since the date of the rendering of the bill, Messrs. Ridgway & Irwin had dissolved partnership.

Bryant in support—Items (*a*), (*b*) and (*c*) should certainly not be allowed in this bill, though possibly they might be allowed

(*a*) [1901] 7 A.L.R. (C.N.) 10. (*b*) [1896] 22 V.L.R. 135.

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on a different principle outside this bill. They were charges for work as a mere financial or estate agent, and not as an attorney or solicitor. The business contained in a taxable bill must be business connected with the profession of an attorney or solicitor: See *Allen* v. *Aldridge* (*c*). The charges must be "for such professional business as he is employed to do as an attorney or solicitor—that is, by reason of his character as an attorney or solicitor:" *Smith* v. *Dimes* (*d*). See also *Harbin* v. *Darby* (No. 1) (*e*). Non-professional charges should be in a separate bill: *In re Remnant* (*f*). By Order LXV., r. 8, Appendix N. is made applicable only where there is a "cause" or "matter" as defined by the *Supreme Court Act* 1890, sec. 3.

Meagher for Ridgeway to oppose—The bill of costs of an attorney for work done as a parliamentary agent has been held taxable: *Ex parte Hopkins* (*g*). The right to have a reference to taxation in that case was determined "by the character of the person who had done the work; and, because the person who had done the work was a solicitor, and consequently amenable to the summary jurisdiction of the Court, it was held that the bill of costs was taxable:" See *Ex parte Beck* (*h*). The question whether the services are professional or not is one of fact for the taxing officer, who has exercised his discretion as to every one of the charges objected to. *Cf. Re Coburn* (*i*) and *Chambers* v. *Green* (*k*). "A solicitor should be allowed for 'ordinary attendances' in all cases where his own personal skill and knowledge may be involved:" See *In re Rowbotham, Ex parte Skinner* (*l*).

Counsel also referred to *In re Congreve* (*m*) and *In re Jones* (*n*).

Schutt for Irwin (by permission of the Judge)—Where work has been done by a professional man, who has been retained as

(*c*) [1844] 5 Beav. 401.
(*d*) [1849] 4 Exch. 32, 40.
(*e*) [1860] 28 Beav. 325.
(*f*) [1849] 11 Beav. 603.
(*g*) [1877] 3 V.L.R. (L.) 115.
(*h*) [1895] 21 V.L.R. 362, per Hodges, J., 364.
(*i*) [1901] 7 A.L.R. (C.N.) 10.
(*k*) [1876] 2 V.L.R. (L.) 194.
(*l*) [1896] 22 V.L.R. 135.
(*m*) [1841] 4 Beav. 87.
(*n*) [1872] L.R. 13 Eq. 336.

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attorney by the client, the Court should not interfere with the discretion of the taxing officer in inferring that it was done by him in his professional capacity. The burden of proof is upon the client to satisfy the taxing officer to the contrary.

HODGES, J. This is a dispute between solicitor and client The solicitor has delivered a bill of costs, and the client has required that that bill should be taxed. The taxing officer has taxed it, and the client is dissatisfied.

The first question is as to whether certain portions of the charges should be allowed at all. The contention of the one side is that they are not for solicitor's business at all; that they are for the business of an estate agent, or something of that kind, and as such cannot be taxed, and the taxing officer cannot allow them, but must simply strike them out of the bill. The first three items of the bill are made up of amounts of that kind. Whether or not the whole of these amounts are of that character it is not possible for me to tell by looking at the bill, or by looking at the particulars; nor do I think I can determine that question by an examination of the affidavits. But I do not consider that it is necessary for me to examine the affidavits. The taxing officer has not considered the matter upon that basis at all, so that it must go back to him.

I propose to say a few words as to the grounds upon which he ought to strike out certain of the amounts claimed. I think it is clear, although I have not read the affidavits, that a number of the charges made are simply and purely charges for work which is ordinarily done by an estate agent, and is in no way properly the work of either a barrister, solicitor, attorney, proctor, or conveyancer. They are charges purely and simply for the collecting of debts. With regard to those, in my opinion, no charge as attorney can be made. It is not sufficient with regard to such items to say that the person making the charge is an attorney, that he acted as attorney for a client, or that he was retained as attorney. The taxing officer has no knowledge of the business of an estate agent, or is not presumed to have any knowledge of the business of an estate agent, and is not presumed to be capable of taxing the charges of an estate agent

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He might in the same way be required to tax the charges of carrying on some other business, if attorneys could carry on any business they pleased for their clients, and could come to the taxing officer to get the charges of carrying on such business taxed. It would be impossible for the taxing officer to discharge duties of that kind. Taxing officers are appointed to tax the bills of attorneys, solicitors, proctors, or conveyancers—in other words, to tax bills of costs rendered by them as practitioners of the Court, of which they are officers. When matters get outside that he cannot tax them—he must run his pen through them and refuse to tax them, and should say—"You must get some other tribunal to deal with this item." I cannot say that the first three items are of that character. I cannot say that it is an estate agent's business where, for example, a mortgagor is in default, and a letter is sent to him to pay up the amount or otherwise proceedings will be taken. That is clearly attorney's work. I give that merely as an illustration. There may be in the particulars of these items many other pieces of work of that class. For any work which is the ordinary work of an attorney, he is entitled to charge as an attorney, and is entitled to have the bill taxed as an attorney. But directly he gets outside that, the taxing officer cannot tax the item—he must simply strike it out.

The next objection made here is as to the scale on which the taxing officer has taxed. It is somewhat curious, but Order LXV., r. 8, provides—"In causes and matters commenced after these Rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'lower scale' in Appendix N. in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this Order otherwise provided for; and in causes and matters pending at the time when these Rules come into operation, to which the higher scale of costs previously in force was applicable, the same scale shall continue to be applied."

In the interpretation clause, which is in the Act to which these rules form a schedule—the *Supreme Court Act* 1890, sec. 3—"cause" is defined to "include any action, suit, or other original proceeding between a plaintiff and a defendant, and any

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criminal proceeding by the Crown;" and "matter" is defined to "include every proceeding in the Court not in a cause." So that "causes" and "matters," according to those two clauses of interpretation, include, roughly speaking, all proceedings in courts, and it might be supposed nothing beyond that. But it is important to observe that the word "matter" is defined to "*include* every proceeding in the Court not in a cause;" it is not defined to "mean" or to be confined in meaning to "every proceeding" in the Court not in a cause, and that word may consequently include something more than what that clause would seem to indicate. It includes that, but it does not say it shall not include anything else, and, curiously enough, Appendix N. contains, not only a scale relating to proceedings in the Court, but a scale also for conveyancing matters.

Now, looking at the two portions of Appendix N., this much is clear—the Legislature thought that the scale would be different in a proceeding in litigation to what it would be in conveyancing; and, in my opinion, the taxing officer, when he is taxing something which does not come within anything referred to in Order LXV., r. 8—because the Appendix does not refer to it—when he has to tax matters not coming within it (and in my opinion some of these matters are matters not within it), neither of these schedules can be, so far as he is concerned, the governing test. In other words, they are not absolutely binding on him. He may look to them as guides, as helps, as he may look to, in my opinion, other matters within his knowledge—and within the knowledge of any other practitioner—in determining what is a fair amount to be allowed. Where the matter is altogether outside Appendix N., he cannot be bound by the scale that is fixed in Appendix N.

In this case, as I understand the taxing officer, he felt himself bound by Appendix N., although that appendix does not really cover matters of the kind which he had to tax. It may be a difficult matter for the taxing officer to determine what is a fair allowance to make for work in respect of which he has no schedule to guide him. I think it would be, and it would be a still more difficult matter for the Court to interfere with his discretion in a matter of that kind, or with any

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conclusion he may arrive at if he works on that principle. However difficult it may be, it is his duty to do the best he can to solve his difficulty. It is not as difficult as it would be if he had to tax in respect of any kind of business which one man might do for another.

The matter must go back to the taking officer to consider the whole taxation. Costs to be paid by the solicitors.

Summons allowed.

Solicitor for Mrs. Wilkie: *C. H. Lucas.*

H. I. C.

HODGES, J.
1903
June 9, 16.

DARLING *v.* CARTER & CO.

Practice—Banker's books—Production of banker's books at trial—Undertaking by bank to produce verified copies—Circumstances under which verified copies of banker's books are admissible in evidence—Evidence Act 1890 (*No.* 1088), *ss.* 35, 36, 39.

The Court has power under sec. 39 of the *Evidence Act* 1890 to order the production of a banker's books at the trial of an action, although the bank is not a party to the action.

Hay v. *Paterson, In re The Colonial Bank* ([1889] 15 V.L.R. 360).

The Court will grant an order for such production, notwithstanding an undertaking by the bank to have verified copies of all the material entries in such books in Court at the trial to be used in evidence if the Court should so direct, because such verified copies could not in the circumstances, by virtue of sec. 36 of the Act, be adduced in evidence at the trial.

APPLICATION under sec. 39 of the *Evidence Act* 1890 for an order that the Bank of Australasia "upon service of a *subpœna tecum duces* should produce at the trial of this action all its ledgers, day books, cash books, or other account books and vouchers relating to or containing the account of W. T. Barlow, kept at its St. James's branch during the period between the 1st January 1902 and the 1st June 1902, both inclusive."

The plaintiff was John Darling, jun., trading as John Darling & Son, and the defendant was H. Carter & Co., and the action was for damages for the conversion of certain wheat, for which both the plaintiff and defendant had paid Barlow, but which had been delivered to the defendant.

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Davis for the defendant—A similar application was granted by A'Beckett, J., in *Hay* v. *Paterson, In re The Colonial Bank* (a).

The managing clerk for the bank's solicitors to oppose.

HODGES, J. In this case application was made to me under sec. 39 of the *Evidence Act* 1890 for an order directing the Bank of Australasia to produce its ledgers, day books, cash books, and so forth to the Court on the hearing of the trial of this action. The bank is not a party to the action. From the language of that section, which provides that "no bank shall be compellable to produce the ledgers day books cash books or other account books of such bank in any legal proceedings unless a Judge specially orders that such ledgers day books cash books or other account books should be produced at such legal proceedings," I was disposed, at the hearing of the application, to think that I had a discretion as to whether I would or would not order the production of the books, and was at the time prepared, if the bank undertook to deliver verified copies to the applicant, to refuse the application on that undertaking. The bank, however, expressed its unwillingness to supply verified copies, upon the ground that it was not justified in disclosing its client's affairs; but it was willing to have verified copies in Court at the trial to be used in evidence if the Court should so direct, and I have stayed my hand to consider whether under these circumstances I should make the order.

An examination of secs. 35 and 36 of the *Evidence Act* 1890 makes it clear that the bank's proposed undertaking would be perfectly useless to the applicant, because the copies are only secondary evidence, and can only be admitted in so far as this Act authorizes their admission. Now, sec. 35 provides that "copies of all entries in any ledgers day books cash books or other account books used by any such bank may be proved in all legal proceedings as evidence of such entries without production of the originals by means of the affidavit of a person who has examined the same stating the fact of the said examination and

(a) 15 V.L.R. 360.

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that the copies sought to be put in evidence are correct," and if the matter remained there it might have been clear that these documents could be used in the circumstances stated. Sec. 36, however, provides that "no ledger day book cash book or other account book of any such bank and no copies of entries therein contained shall be adduced or received in evidence under this Division of this Part of this Act unless five days' notice in writing or such other notice as may be ordered by the Court containing a copy of the entries proposed to be adduced and of the intention to adduce the same in evidence shall have been given by the party proposing to adduce the same in evidence to the other party or parties to the said legal proceedings and that such other party or parties is or are at liberty to inspect the original entries and the accounts of which such entries form a part, etc." So that these copies, which the bank state they would be willing to have in Court ready to be produced if the Court should so direct, could not be used by the applicant, because he could not give five days' notice of his intention to adduce the same in evidence, and the other party could not inspect the original entries.

Without pursuing the matter further, it is clear that I am bound in this case to put the parties in the same position as they were in before the Act was passed—that is, I must enable the applicant to have those books in Court, and accordingly I must direct the bank to produce them. I do not know whether the attention of the Legislature has been drawn to the way in which the legislation in this respect has been altered in England; but in England there would be no difficulty in such a case as this. I recognize the serious inconvenience which may be caused to the bank by the granting of this application, and the way in which it may for the time occupied by the trial practically have to stop its business—certainly stop the regular entry of the daily transactions in the books—and regret that I have not power to make some order that would prevent that inconvenience without doing injury to either of the litigants. But that power, which I would have had under the English Act, I have not under this Act—in fact, the position under the two Acts is totally different. I think that under the English Act this application

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would not have been necessary. The copies could have been used at the trial with proper verification.

I therefore grant this application.

Application granted.

Solicitors for the defendant: *Madden & Butler.*

Solicitors for the bank: *Moule, Hamilton & Kiddle.*

H. I. C.

HORRIGAN *v.* McPHERSON.

A'BECKETT, J.
1903
May 26, 28.

Practice—County Court Act 1890 (*No.* 1078), *s.* 64—*Action for debt and liquidated demand—Money had and received.*

The plaintiff brought an action against the defendant in the County Court, indorsing his summons as a special summons under sec. 64 of the *County Court Act* 1890. The particulars indorsed on the summons alleged that the plaintiff had been induced by the fraud and misrepresentation of the defendant's agent to enter into a contract, and had paid a deposit of 50*l.*; that the misrepresentations were false, and that the consideration for the deposit had wholly failed, and claimed the return of the 50*l.* An alternative claim was added claiming 50*l.* as money had and received. Upon an objection being taken that the claim was not one for a debt or liquidated demand within the meaning of sec. 64:

Held, that the particulars disclosed circumstances which amounted to a claim for money had and received, and that the alternative claim did not alter the nature of the preceding claim, and that therefore the action was for a liquidated debt or demand within sec. 64 of the *County Court Act* 1890.

THIS was a rule *nisi* obtained by Hugh Macpherson, who was the defendant in an action in the County Court, brought by F. Horrigan, calling upon the plaintiff to show cause why His Honor Judge Hamilton, a Judge of the County Court, should not be prohibited from further dealing with the case, on the ground that he had no jurisdiction. The plaint was issued as a special summons under sec. 64 of the *County Court Act* 1890.

The following was the form of the plaint:—"The plaintiff demands of you 50*l.* under the following circumstances:—(1.) In the month of July 1902 the defendant by his agent entered into negotiations with plaintiff with a view of selling his interest in the unexpired lease, furniture, and goodwill of the Imperial Hotel. (2.) In the course of such negotiations, on the 30th July 1902, the defendant by his agent warranted and represented to the plaintiff that the owner of the said hotel was willing, and

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had stated that he was willing, to accept the plaintiff as tenant of the said hotel on the same conditions and rent as the defendant then held the said hotel. (3.) The plaintiff was thereby induced to purchase the said interest, and then and there paid the sum of 50*l.* as a deposit in part payment of the purchase money, relying on the truth of what the defendant by his agent had stated. (4.) The defendant's statement was not true; the said owner was not willing, and never said he was willing, to accept the plaintiff as tenant on the same conditions and rent as the defendant. On the contrary, he demanded a higher rent from the plaintiff. (5.) The defendant by his agent was well aware of the facts stated in the preceding paragraph when he made the said statement, and he made the same fraudulently, with the intention of inducing the plaintiff to purchase the said interest, and to pay the said deposit on the faith thereof. (6.) The plaintiff, on discovering that the defendant's statement was false, repudiated the said purchase, and refused to complete the same, and the consideration for his said deposit of 50*l.* has therefore wholly failed. And the plaintiff claims the return of the said deposit of 50*l.*"

Alternatively the plaintiff's claim is for money received by the defendant for the use of the plaintiff.

The plaintiff claims 50*l.*

The defendant's solicitor had filed a notice of intention to object to the jurisdiction of the County Court to deal with the plaint in its present form. Interrogatories had been delivered by the plaintiff which the defendant did not answer, and the plaintiff gave notice that unless the interrogatories were answered by a certain date he would apply for judgment. The defendant then obtained this rule *nisi* for prohibition, the ground being that inasmuch as the plaint was not for a debt or liquidated demand the Judge had no jurisdiction to entertain it.

Potts to move the rule absolute.

Jacobs to show cause.

Cur. adv. vult.

May 28.

A'BECKETT, J. I have had to consider this matter arising out of the construction to be placed upon sec. 64 of the *County Court*

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Act 1890 applying "to any action in a County Court brought to recover a debt or liquidated demand only. . . ." The practice under the section is analogous to the practice in the Supreme Court under Order XIV. as to giving leave to defend or ordering final judgment. This action was commenced in the County Court, and the subject-matter arose out of a transaction in which a sum of money was paid to an agent of the defendant for the purchase of the lease and goodwill of a certain hotel; the sum of 50*l.* was paid as a deposit. Then the plaintiff alleges that misrepresentations were made by the agent for which the defendant is responsible, and he brings this action to get back the sum of 50*l.* so paid. The particulars of demand are indorsed on the plaint. (His Honor read the particulars.) When this matter came before the Judge of the County Court it was urged that this was not an action to recover "a debt or liquidated demand only," and that it was to be considered as an action for damages, and that the alternative claim for money had and received would not save it. It was contended that, treating it as an action for money had and received simply, it would not be a debt or liquidated demand within the terms of sec. 64. I think, however, that it is such a cause of action. It was not contemplated that if there were a denial of the facts that summary judgment would be allowed; in that kind of case a Judge in the exercise of his discretion would probably say that leave to defend should be given, but that is a matter of discretion, and the Judge has not exercised his discretion in that direction. The objection that was raised was that the action was not within the section, and that therefore he had no jurisdiction to deal with the matter as he has dealt with it and the rule *nisi* to prohibit has been taken out on that ground.

I have now to consider whether the claim does come within the words of sec. 64. I agree with the argument of the defendant that supposing these particulars of demand had been in the first place a claim for damages in respect of this transaction, the alternative claim, as it is put, would not prevent the objection being raised that the claim was for something which was not a mere liquidated demand or debt. The particulars indorsed on the demand use some words which are not applicable, and are con-

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fusing, and then the plaintiff claims a return of the deposit, an alternatively he claims for money had and received. There i no alternative about it in one sense, but I think it is quite cle from these particulars, and the Judge of the County Court mu have taken the same view, that all that is sought is the retur of the 50*l.*, and that this is not an action for damages. It woul be properly described in the first branch of the case as well in the second as a claim for 50*l.* That is a liquidated deman and is an action for money had and received, and would com within the words of sec. 64. It is also within Order III r. 6, of the "Rules of the Supreme Court," and within th purview of Order XIV., the terms of which are stricter than th provisions of the *County Court Act.* Under the Supreme Cou practice, according to the statements in the *Annual Practi* and also from what is to be inferred from *Bullen and Leake* *Pleadings*, an action for money had and received can be broug under Order III., r. 6. Such an action, or the right to succe in such an action, may depend upon complicated facts, giving ri to various equities, showing circumstances which would entit the plaintiff to say that the money was received for h use and benefit. The facts may be so complicated that only lawyer could spell out such an action; but it might still be with the rule. I think these particulars are within sec. 64, a although the word "alternatively" has been foolishly intr duced, this does not alter the effect of what precedes. If t particulars had stopped before coming to what is called t alternative it would have indicated sufficiently that it was claim for a liquidated demand, and could be sustained as action for money had and received.

The rule will be discharged with costs.

Solicitors for plaintiff: *Reynolds & Lamplugh.*
Solicitor for defendant: *Potts.*

W. H. M.

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In the Will of CHARLES RYDER.

A'BECKETT, J.

1903
May 28,
June 15.

Practice probate—Will—Separate wills of Australian and English property.

Where a testator has made separate wills as to his English and his Australian operty it is not necessary in an application for probate of the Australian will to corporate the English will, and probate may be granted of the Australian will ly, but the probate should bear on its face a note referring to the fact that an idavit is on the file of the Court giving date and particulars of the English obate and certifying an attached copy of the English will.

THIS was an application for probate of the will of one Charles yder. The testator had made two wills, one dealing with his nglish property and the other dealing with his Australian roperty. The Australian will directed that the proceeds of Aus-alian property should be transmitted to the English executors. robate of the English will had been granted, and the present pplication related to the Australian will. The Registrar raised he question whether he could grant probate of the Australian vill unless the English will and codicils were incorporated in uch grant.

Hayes in support of the application. *Cur. adv. vult.*

June 15.

A'BECKETT, J. In this case the testator made separate wills as to his English and his Australian property. Probate of the English will has been granted in England, and an application has been made for probate of the Australian will, which directs transmission of the net proceeds of the Australian property to the English executors.

A question has arisen as to whether the probate here should incorporate the English will, treating the English and Australian wills as together constituting the effectual testamentary disposition. On the authority of *In the goods of Astor* (*a*), and *In the goods of Callaway* (*b*) I think that it will be unnecessary to incorporate the English will, and that probate may be granted of the Australian will only, but that the probate should bear on its face a note referring to the fact that an affidavit is on the file of the Court giving date and particulars of the English probate, and verifying an attached copy of the English will.

Solicitors: *Harwood & Pincott.*

W. H. M.

(a) [1876] 1 P.D. 148. (b) [1890] 15 P.D., p. 147.

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HODGES, J.

1903
June 17, 23.

DALTON *v.* McNAUGHTON *and* PITCHER.

Police Regulation Act 1890 (*No.* 1127), *s.* 58—*Information and warrant for steali goods—Authority of constable to seize goods—Information not heard—Disput property in possession of police—Application to justices to determine possession Horse—"Goods"—Authority of constable to arrest a suspected person.*

The application to justices by a constable under sec. 58 of the *Police Regu tion Act* 1890 may be made in all cases where the constable, as such, has lawful taken possession of goods (except where the goods have been distrained und the warrant of a justice), and it is doubtful who is entitled to the possession them.

A constable may lawfully take possession of goods alleged to have been stol where he does so without force or violence.

A horse is "goods" within the meaning of sec. 58 of the *Police Regulat Act* 1890.

A constable is justified in arresting a person whom he has reasonable grou to suspect has committed a felony, although in fact no felony has been co mitted.

ORDER TO REVIEW.

The defendant, George Pitcher, swore an information agai his son for the larceny of a horse, and on the 10th March 19 a warrant was issued for the latter's arrest. On the same d the horse was traced to the possession of the defendant Dunc McNaughton, by whom it had been *bonâ fide* purchased fro horse-dealer on 28th February 1903, and was seized by the co plainant, Constable Dalton, who gave M'Naughton a receipt it in the following terms:—"10th March 1903. Received fr Mr. Duncan McNaughton, one horse stolen from Geo Pitcher." Neither the warrant referred to, nor one issu on 12th March 1903, for execution out of the jurisdicti was ever executed. Both defendants afterwards clai the horse, and, after notice to each of them, the complainant, the 11th May 1903, made an application under sec 58 (*a*) of t

(*a*) *Police Regulation Act* 1890, sec. 58:—"When any member of the police force shall have taken possession of any goods other than goods distrained under the warrant of any justice and it is doubtful whether any person claiming such goods or which of any two or more persons so claiming is entitled to the possession thereof any two justices upon the application of such member and the presence of all the parties claim such goods or in the absence of such parties who have had reas able notice of the hearing of s application shall not appear may h receive and examine evidence touch the matter of such application and n order to whom such goods shall

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Police Regulation Act 1890 to the Court of Petty Sessions at Melbourne to order to whom the horse should be delivered, and the Court, after hearing evidence, ordered that it should be delivered to the defendant Pitcher.

An order *nisi* to review this decision was granted by Williams, J., on the application of the defendant McNaughton, on the following grounds, *inter alia* :—

(1.) That the complainant had not taken possession of the horse by any lawful authority, or at all within the meaning of *Police Regulation Act* 1890.

(2.) That it was not proved that any prosecution had taken place with respect to the horse, and the evidence showed that such prosecution had not taken place.

(3.) That the horse was not "goods" within the meaning of the *Police Regulation Act* 1890.

Schutt for the defendant McNaughton to move the order absolute.

Davis for the complainant Dalton, and *Power* for the defendant Pitcher, to show cause.

Davis—(1) The words "under the warrant of any justice" in sec. 58 qualify the words "goods distrained" only, and the object is to exclude from the operation of the section such cases as where goods have been distrained under a warrant under the *Landlord and Tenant Act*. This section is taken from the Act 2 & 3 Vict., ch. 71, sec. 29. *Cf.* also *Justices Act* 1890, secs. 25 (4) and 98. "It is within the power of, and is the duty of, constables to retain for use in Court things which may be evidence of crime, and which have come into the possession of constables without wrong on their part:" See per Wright, J., in

delivered by such constable and such goods shall be delivered accordingly and if after the making of such order any action shall be commenced against such constable for the recovery of such goods or the value thereof such order and the delivery of the goods in pursuance thereof may be given and shall be received in evidence in bar of such action but such order or delivery shall not affect the rights or liabilities of the persons claiming such goods or to whom the same shall have been delivered as aforesaid."

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The Queen v. *Lushington, Ex parte Otto* (*b*). See also per Sir Russell, A.G., *in arguendo*, at p. 421, citing *Davis* v. *Roe* (where it was held that an unwritten order by a magistrate f impounding goods in order that they may be produced evidence is good. When the horse was seized, an informati had been sworn against an individual for stealing it, and warrant for his arrest had been issued. A search warrant required only where a breaking-in is necessary. *Cf. Justi Act* 1890, sec. 25 (3). The observations in *Coghill* v. *Warrell* (and in *Kelleher* v. *Heffernan* (*e*), which appear to support t contention of the other side, are merely *obiter*.

(2) Sec. 58 does not say there shall first have been a pro cution.

[HODGES, J. This objection seems to me to be included the first objection.]

(3) Secs. 20 and 21 of the *Police Offences Act* 1890, whi are relied upon as to this objection, are not, like sec. 58 of t *Police Regulation Act* 1890, for the protection and relief of t police. Further, sec. 20 absolutely determines the ownership the cattle. The word "goods" is defined in *Stroud's Judici Dictionary* as synonymous with "chattels," and as including animals.

Power—The policy of the Act is to protect constables in t discharge of important and onerous duties, and it should ther fore be liberally construed. If a constable did not take po session of goods alleged to have been stolen, they might be lo or destroyed, and the course of justice impeded. In the case *Winter* v. *Banks*, referred to in *Stone's Justices of the Pea* (35th ed.), p. 72, a policeman who had handed over property to person who had been acquitted was held liable in trover.

Counsel also referred to *Dillon* v. *O'Brien and Davis* (and 60 & 61 Vict., c. 3, secs. 1 and 2.

Schutt—Sec. 58 is expressly limited to cases where constable has taken possession of goods under the warrant of

(*b*) [1894] 1 Q.B. 420, at p. 423.
(*c*) [1846] 10 J.P. 385.
(*d*) [1890] 16 V.L.R. 238, at p. 241.
(*e*) [1899] 24 V.L.R. 915, at p 916, 917.
(*f*) [1887] 20 L.R. (Ir.) 300.

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justice. *Cf.* Act 2 & 3 Vict., c. 71, sec. 29. At any rate, the section is limited to cases where a constable is acting under some lawful authority, as, *e.g.*, a search warrant, without which he has no power either at common law or by statute to go to a person and say—"These goods in your possession are stolen; I want them." A constable need not do everything which a search warrant authorizes, such as breaking in. Further, the Crown could call upon the person in whose possession goods alleged to be stolen are, to produce them at the trial in the ordinary course, with the issue of a search warrant as an alternative course. The observations of the learned Judges in the cases of *Coghill* v. *Warrell* (*g*) and *Kelleher* v. *Heffernan* (*h*) greatly strengthen this view. In the latter case Holroyd, J., says that the reason why the justices had jurisdiction was because the police had got possession under a valid search warrant, and he distinguishes it from the former case, where the search warrant was invalid. The passage cited from the judgment of Wright, J., in *The Queen* v. *Lushington, Ex parte Otto* (*i*), speaks of "things which have come into the possession" of constables, not things which have been seized, and perhaps violently seized. The next sentence in that passage shows the true position to be that "when articles have once been produced in Court by witnesses the constable in whose charge they are placed may preserve and retain them so that they may be always available for the purposes of justice until the trial is concluded." In other cases he must get a search warrant.

On this point counsel also referred to *Police Regulation Act* 1890, secs. 17 and 18, and *Justices Act* 1890, sec. 25, sub-secs. (1) to (5).

(2) The Full Court, in its judgment in *Coghill* v. *Warrell* (*k*), treat sec. 58 as a sort of supplementary section to sec. 496 of the *Crimes Act* 1890, which only comes into operation after a prosecution has been had.

(3) The provisions in the *Police Offences Act* 1890 as to stolen cattle are intended to constitute a complete code, and under sec. 21 a person in whose possession stolen cattle are is

(*g*) 16 V.L.R. 238, at p. 241.
(*h*) 24 V.L.R. 915, at pp. 916, 917.
(*i*) [1894] 1 Q.B. 420, at p. 423.
(*k*) 16 V.L.R. 238, at p. 244.

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given the right to recover against the vendor to him. T
proper proceedings here should have been under that Act, whi
provides for a speedy determination as to ownership. Li
stock are different to other "goods," in that they cannot be ke
without expenditure.

Cur. adv. vult.

HODGES, J. In this case a horse had been stolen from c
George Pitcher. He swore an information charging his s
with the theft. The horse was in the possession of one Dunc
McNaughton, and had honestly come into his possession as far
he was concerned, but he made title to it practically throu
the thief. Constable Dalton, on an information having be
sworn, seized the horse. Before the information could be hea
the accused thief escaped, and there was no prosecution. Bo
McNaughton and Pitcher claimed the horse, and thereupon t
constable, under sec. 58 of the *Police Regulation Act* 18
applied to the justices to determine to whom he was to deliv
the horse.

It was contended on behalf of McNaughton that the justi
had no jurisdiction under that section to determine anythi
in the matter. The first two lines of that section provi
that "when any member of the police force shall have tak
possession of any goods other than goods distrained under t
warrant of any justice," etc. The contentions all turn upon t
construction of those two lines. For the constable it was co
tended that the construction was—"When any member of t
police force shall have taken possession of any goods" (pau
there) "other than goods distrained under the warrant of a
justice" (pause there) "and it is doubtful," etc.; that that w
the way in which the section was to be read. On behalf
McNaughton it was contended that the section should be read
"When any member of the police force shall have tak
possession of any goods other than goods distrained" (pau
there) "under the warrant of any justice," etc.—in other wor
that the first pause should be after the words "goods distrained
and not after the word "goods" where it first occurs. In m
opinion that is not the correct construction. I think that t

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words "goods distrained under the warrant of any justice" are taken from sec. 98 of the *Justices Act* 1890, where the same words are used, and as the *Justices Act* provides for the mode in which the dispute in that case is to be settled, this section was not dealing with that case, and in my opinion this section is intended to apply substantially to all cases in which a constable has lawfully taken possession of goods, except the case where they have been distrained under the warrant of a justice. It is intended to protect the police in the discharge of their duties, and the one part of the section is co-extensive with the other. Whenever a member of the police force shall have seized goods he is protected, and can come and ask the justices to say to whom he is to deliver the goods. It will not protect him if he has not seized the goods as a member of the police force—it will not protect him if he has seized them, for example, in a private dispute. But if he has lawfully seized them as a member of the police force, then in my opinion it was intended that that section should provide the means by which he can lawfully get rid of the responsibility of keeping the goods.

That being so, it next remains for me to consider whether these goods were lawfully seized by Constable Dalton. Sec. 9 of the *Police Regulation Act* 1890 provides—"Every constable shall have such powers and privileges and be liable to all such duties as any constable duly appointed now has or hereafter may have either by the common law or by virtue of any Act of Parliament now or hereafter to be in force in Victoria." As there is no Act so far as I know "now or hereafter in force in Victoria" which gives the constable power to seize stolen goods, I am forced to consider whether the constable has at common law power to seize stolen goods. I am able to find no direct authority on the point, but in *Samuel* v. *Payne* (*l*) the question arose as to whether a constable was justified, or empowered, or had authority to apprehend a person suspected of committing a felony, and it there states:—"At the trial His Lordship and the counsel on both sides looked upon the rule of law to be that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the

(*l*) [1780] 1 Doug. 359.

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suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by anybody. His Lordship therefore left it to the jury to consider whether any felony had been committed. The rule, however, was considered as inconvenient and narrow; because, if a man charges another with felony, and requires an officer to take him into custody and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate who is authorized to examine and commit or discharge." That decision has been approved of in later years in the case of *Beckwith* v. *Phillips* (m) and it has been finally settled that "a constable, having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, although it afterwards appears that no felony has been committed." So that I take it that those two cases establish that a constable is authorized to apprehend an individual whom he has reasonable ground to suspect has committed a felony, although that individual has committed no felony, and although in fact no felony has been committed.

Now, it would seem strange if a man's liberty could be in this way interfered with, and he could be apprehended, when not only has he not committed a felony, but no felony has been committed, and if at the same time a constable had not the authority to seize goods that are actually stolen. While I can find no direct authority on that point, I certainly think that from those authorities I could have drawn the inference that, if the constable had power to do the one, he had power to do the other; but I have found a case in which the question arose and in which, although the point was not expressly decided, it was assumed to be the law—namely, the case of *Mellor* v. *Leather and Clough* (n). That was an action of replevin, and the facts, so far as material, were as follows:—"Clough was a policeman for the borough of Liverpool. The defendant Leather being in possession of a horse which the plaintiff claimed as his

(m) [1827 6 B. & C. 635. (n) [1853] 1 E. & B. 619.

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property, the plaintiff sent a man named Harrison to take possession of it. Harrison did so, and gave it to plaintiff. Upon this the defendant Leather charged Harrison with stealing the horse; and, upon this charge, Clough, to whom it was made, caused Harrison to be apprehended, and took possession of the horse, which was in the county of Lancashire, but not in the borough." Clough took possession of the horse, and the whole question in the judgment was as to whether he could rely upon the particular facts in a plea of *non cepit*. The important part of the case is this statement in the reserved judgment of Lord Campbell, C.J, at pp. 625, 626:—"The actual taking of the horse, which was the fact committed by the defendants, was beyond the limits of the borough of Liverpool, but within the the county within which the borough was situate; and there was no question but that the defendant Clough would be justified as a constable in what he did, provided he was entitled to give the special matter in evidence under the plea of *non cepit*, which was the only plea he pleaded." The Court then proceeds to consider whether he was entitled by sec. 133 of Statute 5 & 6 W. 4, c. 76, to give the special matter in evidence under the plea of *non cepit* in replevin, as he was, at the time of the fact committed, a constable acting in the execution of that Act, and that what he did was in pursuance of it. The Court came to the conclusion that he was, and gave judgment for him.

So that it assumes, as the basis of that judgment, that he had authority to seize a horse which was alleged to have been stolen, and they treat that as a fact as to which there was no doubt, the only doubt being as to whether he was entitled to give the special matter in evidence. I think that that shows that a constable has power to seize property which is alleged to have been stolen, and I am therefore of opinion that Constable Dalton had power to seize this horse; and having power to seize this horse, the horse came lawfully into his possession as constable; and the horse having lawfully come into his possession as constable, he could lawfully apply under sec. 58 of the *Police Regulation Act* 1890 to get rid of his liability by asking the justices to determine to whom the horse could be delivered.

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I am not, of course, deciding any question as to the right to break into people's houses and take property from them. I am only determining the position in cases, where there is no force or violence of any kind, where property is in the possession of an individual, from whom it is demanded by a constable, and who gives it up to the constable when he demands it.

As to the other grounds of the order *nisi*, I do not think it is necessary for me to consider them in detail, as I do not think there is anything in them.

The order will be discharged with costs.

Order discharged, with costs.

Solicitor for the complainant, Dalton: *Guinness*, Crown Solicitor.

Solicitors for the defendant McNaughton: *Parkinson & Wettenhall.*

Solicitor for the defendant Pitcher: *F. Barrett.*

H. I. C.

A'BECKETT, J.
1903
May 28, 29, *June* 16.

[IN CHAMBERS.]

KOETSVELD *v.* PATRICK.

Police Offences Act 1890 (*No.* 1126), *ss.* 6, 82, 99—*Local authority—Regulations—Ultra vires and meaningless—Obstructing footway—Authority to prosecute—Justices Act* 1890 (*No.* 1105), *ss.* 77 (15), 141—*Conviction wrongly drawn up—Grounds for setting aside—Amending—Order to review.*

The fact that a conviction, otherwise good, is incorrectly drawn under sec. 77 (15) of the *Justices Act* 1890 is no ground for setting the conviction aside.

An order of a court of petty sessions, as pronounced by the chairman, fined a person accused of obstucting the footway 10*s.*, in default 24 hours' imprisonment. The order as drawn up read—"Fined 10*s.*, in default 3 days' imprisonment."

Held, that this was not a ground for setting aside the conviction, but only for amending it.

Any member of the police force may by virtue of sec. 99 of the *Police Offences Act* 1890 prosecute, without special authority, for a breach of a regulation made by a local authority under sec. 6 of the same Act for preventing any obstruction of the footway.

ORDER TO REVIEW.

The defendant, David Patrick, was proceeded against by information in the Court of Petty Sessions at Richmond, for

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that he did, on 29th March 1903, "obstruct the public footway at the corner of Bridge-road and Lennox-street, Richmond, by assembling thereon with other persons contrary to the Statute in the case made and provided." The proceedings were taken under the following by-law:—

"In pursuance of the power given in and by sec. 2 of the Act to amend the *Police Offences Statute* 1865 the Council of the Town of Richmond make the following regulation:—

"Regulation 8. No person shall obstruct any of the carriage or footways or public places of the said Town of Richmond by assembling thereon."

From the affidavits it appeared that three other informations for the same alleged offence against different defendants were heard together with the information the subject of this order to review.

The evidence of the informant was that on the evening of the day in question "the defendants and about four others were standing near the corner of Bridge-road and Lennox-street. They were obstructing the footway. They were not guilty of any insulting behaviour. I did not warn them or ask them to move on. I have no authority to prosecute under Regulation 8 of the City of Richmond, other than my general authority as a police constable. We watched them for five or six minutes and then took their names."

At the close of informant's case the defendant's solicitor took the objections—(*a*) that the informant had no authority to lay the said information or to prosecute the defendant under the said regulation; (*b*) that the information disclosed no offence. Both objections were overruled by the Bench. No evidence was called for the defence. The Chairman of the Bench announced that each of the defendants was fined ten shillings, in default 24 hours' imprisonment. A minute or two afterwards the Chairman added "in default distress."

The minute of the order of the Court, taken from the register of convictions, orders, etc., of the said Court showed the following entry under the heading "Decision, Memo. of Conviction, or Order," viz.:—"Fined 10*s*., in default 3 days' imprisonment."

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A'BECKETT, J.
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An order *nisi* to review this decision was obtained on the following grounds:—

1. That the minute of the said order shows that the defendant was fined ten shillings, in default 3 days' imprisonment, whereas the order of the said Court was either that the defendant be fined ten shillings, in default 24 hours' imprisonment, or that the defendant be fined ten shillings, in default distress.

2. That the justices were wrong in fining the defendant ten shillings, in default imprisonment, instead of in default distress, and in default of distress imprisonment.

3. That the informant had no authority to lay the said information, or to prosecute the defendant.

4. That the said information disclosed no offence.

5. That there was no evidence that the defendant had broken regulation No. 8 of the Council of the City of Richmond (under which the said information was laid) wilfully.

6. That the said summons was not stamped to show payment of the fee required by sec. 6 of the *Justices Act* 1890, the said summons not being issued by informant as a member of the police force.

7. That the said regulation is bad and illegal, on the grounds that it is meaningless, vague, unreasonable, and *ultra vires*.

On the return of the order *nisi*,

Barrett appeared to move the order absolute.

Schutt to show cause—The conviction as pronounced was good, and the fact that it was wrongly drawn up is a reason for amending it, not for setting it aside. As to the third ground, sec. 99 of the *Police Offences Act* is a complete answer. Sec. 6 of that Act makes a breach of a regulation such as this an offence against the Act, and sec. 99 says that any member of the police force may prosecute for any offence against the Act. As to grounds 4 and 5, the evidence shows that the breach was wilful. It was the duty of the justices to amend the information—*Stait* v. *Colenso* (*a*)—but it is no ground for setting aside

(*a*) [1902] 28 V.L.R. 286.

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their order that they omitted to do so if this Court is satisfied that there was sufficient evidence to prove an offence. Some meaning should be given to the regulation *ut res magis valeat quam pereat*. Its meaning is clear, though it is perhaps badly expressed. "Wilful" does not imply anything blameable necessarily: *Re Young* (*b*).

He referred to *Molyneux* v. *McPherson* (*c*); *O'Donnell* v. *Hitchin* (*d*); *Gleeson* v. *Ah Houn* (*e*); *Madden* v. *Shorten* (*f*); *Lewis* v. *G. W. Railway Co.* (*g*).

Barrett in reply—Where the offence is against a particular municipality, as distinguished from an offence against the whole State, the municipality or somebody authorized by it must prosecute. That seems to be the principle to be derived from *Madden* v. *Shorten* (*h*); *Brennan* v. *Bull* (*i*); *Loft* v. *Wade* (*k*). That it was never intended that *any policeman* may without authority prosecute for such an offence will be seen from an examination of sec. 82. There the words are even wider than those of sec. 99, being "*any person whosoever* with or without warrant may apprehend any person found offending against the provisions of Part I. II. or III. of the Act." The result of the informant's contention would be that if any private person saw half-a-dozen people loitering on the footway, so as to cause an obstruction, he would have power to forthwith arrest them. It is inconceivable that the Legislature meant that. A rational interpretation would be put upon secs. 82 and 99 by reading them to refer only to offences against the community at large—not to the mere breach of a municipal regulation.

He also referred to *Reg.* v. *Panton, Ex parte Schuh* (*l*); *Reg.* v. *Hare, Ex parte Bush* (*m*); *Keane* v. *Schuh* (*n*); *Hearnley* v. *Ormsby* (*o*).

Cur. adv. vult.

(*b*) [1855] 31 Ch. D. 168, at p. 174.
(*c*) [1902] 8 A.L.R. 120.
(*d*) [1892] 27 V.L.R. 711.
(*e*) [1896] 22 V.L.R. 156.
(*f*) [1899] 25 V.L.R. 325.
(*g*) [1877] 3 Q.B.D. 195.
(*h*) 25 V.L.R. 325.
(*i*) [1900] 21 A.L.T. 170.
(*k*) [1899] 20 A.L.T. 35.
(*l*) [1888] 14 V.L.R. 529.
(*m*) [1887] 13 V.L.R. 27.
(*n*) [1890] 16 V.L.R. 199.
(*o*) [1879] 4 C.P.D. 136.

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A'BECKETT, J.
1903
KOETSVELD v. PATRICK.

A'BECKETT, J., read the following judgment:—Order to review a conviction for obstructing the footpath on several grounds.

The first is that the minute in the register states—"Fined 10s., in default 3 days' imprisonment." According to the affidavits on which the order was obtained, the decision of the bench was pronounced thus:—"The Chairman of the Bench announced that each of the defendants was fined 10s., in default 24 hours' imprisonment." A minute or two afterwards the chairman said—"In default distress." I think that these words must be taken to mean 10s. fine, in default distress, and in default of distress 24 hours' imprisonment. This order is undoubtedly wrongly entered. Under paragraph 15 of sec. 77 of the *Justices Act*, an order is to be drawn up. The memorandum is not the order or conviction, but a copy of the minute signed by the clerk of the court is evidence of the making of the order or conviction. The entry should be amended, and I direct its amendment; but an improper entry under paragraph 15 of a proper conviction is not good ground for setting aside the conviction.

Ground 2 is that the justices were wrong in fining the defendant 10s., in default imprisonment, instead of in default distress, and in default of distress imprisonment. On my interpretation of the actual order, it was what objection 2 says it should be.

Ground 3 is that the informant had no authority to lay the information or to prosecute. As to this, it is argued that the police officer, having no authority, had no right to proceed, and was not a person interested by reason of his contingent right to share in the police reward fund. *Gillott* v. *Wade* (p), a case under the *Dog Act*, and *Ex parte Schuh* (q), as to Sunday trading, were referred to, as showing that a police officer as such had no right to sue. This objection is disposed of by sec. 6 of the *Police Offences Act* 1890, which makes the breach of a municipal by-law for preventing obstruction in streets an offence against Part I. of the Act, and sec. 99, which provides that any inspector or officer of the Board of Health or of the

(p) [1898] 20 A.L.T. 35. (q) 14 V.L.R. 529.

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council, or any member of the police force, may prosecute for any breach of or offence against the Act. It was contended that I should restrict the interpretation of this section, which, if literally interpreted, might produce absurd results, and should hold that only in certain cases in which health officers or municipal officers were interested, they could sue, and that only in other cases in which members of the police force were interested they could sue. I think that the section should not be thus restricted. *Keane* v. *Schuh* (r) supports my view. Sec. 99 also disposes of ground 6, that the summons was not stamped.

The fourth ground is that the information disclosed no offence. It stated that the defendant did obstruct the public footway, at the corner of Bridge-road and Lennox-street, Richmond, by assembling thereon with other persons contrary to the statute in that case made and provided. The by-law runs—"No person shall obstruct any of the carriage or footways or public places of the Town of Richmond by assembling thereon." Sec. 6 of the *Police Offences Act* makes every wilful breach of such a by-law an offence under the Act. The information does not state that the breach was wilful. If the defendant had pleaded guilty, he might perhaps have escaped on the authority of *O'Donnell* v. *Gardener* (s). This course was not followed; evidence was gone into, and the objection was not raised until after the informant's case had concluded. The objection might have been cured by amendment, and as the evidence showed the obstruction to have been wilful, the omission to amend should not be ground for quashing the conviction: See *O'Donnell* v. *Hitchen* (t).

The fifth ground is that there was no evidence that the offence was wilful. I hold that there was ample evidence. The accused knew where they were standing. It was sworn that they were in fact obstructing the footway; that they had been watched so standing for five or six minutes, and that they were frequenters of the road almost nightly. Clearly they wilfully did that which caused obstruction, and this was enough to prove, although they were not guilty of insulting behaviour, and had

(r) 16 V.L.R. 199. (s) 27 V.L.R. 718.
(t) 27 V.L.R. 711.

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not been requested to move on: See *Fernley* v. *Ormsby* (u); *Kelly* v. *Melling* (v); *Stait* v. *Colenso* (w).

The last objection is that the by-law is bad and illegal, on the grounds that it is meaningless, vague, unreasonable, and *ultra vires*. It is not good English, but is intelligible. The prohibition which it contains is reasonable and salutary. I overrule this objection.

The order *nisi* will be discharged on all grounds, but amendment will be directed with reference to the point raised by the first ground. This discloses a grave and unexplained irregularity. I therefore discharge the order, without costs.

Order nisi discharged.

Solicitor for informant: *Guinness*, Crown Solicitor.
Solicitor for defendant: *Scheele.*

J. M.

HODGES, J.

1903
June 10.

ROBERTS *v.* ROBERTS.

***Husband and wife—Order for maintenance—Resumption of cohabitation for a ti—Disobedience of order for maintenance—Marriage and Matrimonial Cau Act* 1864 (*No.* 268), *ss.* 30, 31—*Marriage Act* 1890 (*No.* 1166), *ss.* 42, 43, 5**

In 1889 an order was made against a husband under sec. 31 of the *Marria and Matrimonial Causes Act* 1864 (now sec. 43 of the *Marriage Act* 1890) dire ing him to pay the sum of 10*s.* weekly for the maintenance of his wife, on t ground that he had deserted her and left her without means of support. In 18 the husband cohabited with his wife for about a month, during which time maintained her. The husband then again deserted his wife, but continued pay her 10*s.* a week until December 1902, when the payments altogether cease *Held*, that the order for maintenance was annulled by the subseque resumption of cohabitation, and that therefore the wife could not succeed proceedings against her husband under sec. 51 of the *Marriage Act* 1890 disobedience of such order.

ORDER TO REVIEW.

On 18th June 1889, upon a complaint made under sec. 30 the *Marriage and Matrimonial Causes Statute* 1864 by t complainant, Jessie Roberts, that her husband, the defendar

(u) 4 C.P.D. 126. (v) 1 A.L.R. 169.
(w) 28 V.L.R. 286.

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Alfred Roberts, had unlawfully deserted her, and left her without means of support, an order was made under sec. 31 of that Act directing the defendant to pay the sum of 10*s.* weekly to the Clerk of Petty Sessions at Collingwood for the maintenance of the complainant. The defendant made the payments as directed by the order until some time during the year 1895, when he and his wife resumed cohabitation for about a month. After the cohabitation ceased, the defendant paid the sum of 10*s.* weekly directly to his wife until December 1902, when the payments were wholly discontinued. In May 1903 the complainant proceeded against the defendant before the Court of Petty Sessions at Collingwood under sec. 51 of the *Marriage Act* 1890 for disobedience of the order of 18th June 1889, and an order was then made for the arrears of maintenance, amounting to 8*l.*, in default 14 days' imprisonment.

An order *nisi* to review this decision was granted, *inter alia*, on the following ground:—"That the cohabitation between the parties subsequent to the order for maintenance made on the 18th June 1889 nullified the said order."

Barrett to move the order absolute.

The complainant in person to show cause.

Barrett—The case of *Haddon* v. *Haddon* (*a*) shows that where in circumstances such as these cohabitation is resumed the order for maintenance is annulled: See per Hawkins, J., at pp. 781, 782. The resumption of cohabitation has the effect also of releasing the sureties; otherwise they would be bound for all time, whether the husband lived with and maintained his wife or not. The complainant's proper course was to have started fresh proceedings for maintenance.

HODGES, J. An order had been made under sec. 31 of the *Marriage and Matrimonial Causes Statute* 1864—now sec. 43 of the *Marriage Act* 1890—directing the defendant in the Court below to pay 10*s.* a week to the Clerk of Petty Sessions at

(*a*) [1887] 18 Q.B.D. 778.

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Collingwood for the maintenance of his wife, on the ground that he had deserted her and left her without means of support. After that order had been made, the husband continued for some period to pay under it 10*s*. a week for the maintenance of his wife. Then the husband and wife came together again, and lived together again as man and wife. The question I have to determine is, what is the effect of those two coming together and living together as man and wife?

Although there is nothing either in the order itself or in the section under which it is made limiting the period during which the husband is to pay, it is a sum that he has to pay for his wife's maintenance; and consequently, if he maintains her and she accepts his maintenance of her, the obligation to pay the 10*s*. a week is by mutual consent and conduct gone. In my opinion, the fact that he afterwards deserts her and leaves her without means of support gives her a new ground for getting an order against him, but does not give life to an order which, in my opinion, is dead. I regret to be constrained to come to that conclusion, because the man went on paying 10*s*. a week for some years, and there is no reason why he should not have still gone on doing so instead of preferring, as he seemingly does, that other and independent legal proceedings should be commenced, and more money spent in making him pay. However, he is entitle dto his legal rights, and those are his legal rights, and I therefore make this order *nisi* absolute, but without costs.

Order absolute, without costs.

Solicitor for the defendant: *Lowe.*

H. I. C.

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NEWMAN *v.* COLLECTOR OF IMPOSTS.

MADDEN, C.J.

1903
May 28,
June 10.

Stamps—Stamp duty—Settlement made under authority of will—Creation of new beneficial interests—Deed of settlement—Stamps Act 1890 (*No.* 1140), *s.* 71—*Stamps Act* 1892 (*No.* 1274), *Schedule, Division VIII.*

A testator by his will bequeathed property to trustees upon trust for his daughters in equal shares, and declared that the share of each daughter who should be married at his death should be *by deed* settled upon her and her children, free from marital control, and in such a manner as his trustees should, in their discretion, think best, but so as not to deprive any daughter of the annual income thereof, with power to such daughter to appoint one-third of the capital as she might think fit, and in certain other events, which did not happen, to appoint the entire capital.

The trustees by deed transferred to other trustees a daughter's share upon trust to pay the income thereof to such daughter for life, and after her death for "all the children or any the child of such daughter who being sons or a son shall attain the age of 21 years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares."

Held, that as there was a distinct creation or limitation of an interest by the deed, which did not exist before its execution, the instrument was a deed of settlement within the meaning of Division VIII. of the Schedule to the *Stamps Act* 1892, and was liable to stamp duty thereunder.

The principle of *Wiseman* v. *The Collector of Imposts* ([1896] 21 V.L.R. 743) and *In re Austin* ([1901] 27 V.L.R. 408) applied.

CASE STATED under sec. 71 of the *Stamps Act* 1890.

Gerald Patrick Newman and James William Newman were the trustees of a settlement made the 23rd day of December 1902 between Frederick Lloyd and Margaret O'Connor of the first part, Martha Newman and John Aloysius Newman of the second part, and the said trustees of the third part, the portions of which indenture material to this case are set out in the judgment (*infra*) of Madden, C.J.

Upon his opinion being required, the Collector of Imposts notified the trustees that in his opinion the instrument was a deed of settlement or gift within the meaning of Schedule VIII. to the *Stamps Act* 1892 (No. 1274), that the value of the property settled was 2806*l.* 13*s.* 8*d.*, and that the duty thereon at 15*s.* per centum amounted to 21*l.* 1*s.* This duty was paid by the trustees, who required the Collector to state and sign a case in accordance with sec. 71 of the *Stamps Act*, which was accordingly done, the questions submitted for the opinion of the Court being—

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(a) Is the instrument chargeable with any duty?
(b) With what amount of duty is it chargeable?

Cussen for the trustees.

Mitchell for the Collector of Imposts.

The arguments of counsel and the cases cited by the sufficiently appear in the judgment (*infra*).

Cur. adv. vult.

MADDEN, C.J., read the following judgment:—This is a ca stated by the Collector of Imposts for the opinion of the Cou whether the instrument of settlement referred to in the case is settlement within the meaning of the *Stamps Act* 1892, and liable to duty.

Nicholas O'Connor, by his will made 20th December 188 gave devised and bequeathed all his property whatsoever a wheresoever to Frederick Lloyd and Margaret O'Connor th heirs executors and administrators on trust to realize a get in the same upon trust to pay debts etc. and to sta possessed of the balance upon trust for all his children w being sons or a son had attained or should attain the age of years or being daughters or a daughter had attained or shou attain that age or marry under that age, in equal shares, but declared that the share of every daughter who should married at the time of his death or be about to be married unc the age of 30 years should be by deed settled and assured up her and her children and so as to be free from the debts control of any husband and in such way and manner as trustees for the time being should in their discretion appoint think best but so nevertheless as not to deprive any su daughter of the annual income arising from her share during life and with power to her to appoint or dispose of one-third the capital thereof at any time and in such manner as she mig think fit and also with power for her to appoint or dispose the entire capital thereof in such manner as she might think in the event of her having no child or other issue who should

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living when such daughter of the testator should attain the age of 40 years. The testator died leaving several children, of whom Martha Newman was one. She was already married when he died, and she had several children then and now living.

The trustees of the will, Lloyd and O'Connor, intending to act in pursuance of the will, executed the instrument of 23rd December 1902, now in question, whereby they transferred, conveyed, assigned, made over, and appointed unto Gerald Patrick Newman and James William Newman their executors administrators and assigns the share bequeathed by the will to Martha Newman on trust to invest the same and to pay the income thereof to Martha Newman during her life, and from and after her death on trust "for all the children or any the child of the said Martha Newman who being sons or a son shall attain the age of 21 years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares." The indenture also provided that it should be lawful for Martha Newman by deed or will to appoint or dispose of to herself or her executors or administrators or otherwise for her own absolute use and benefit or to any other person one-third part of the said share or premises thereby settled. And it also provided that if Martha Newman should attain the age of 40 years without her having any children or other issue who should then be living, it should be lawful for her by deed or will to appoint or dispose of the whole of the said share thereinbefore settled, or such part or parts thereof as should not theretofore have been appointed or disposed of by her under the power thereinbefore contained.

The question to be decided is whether this instrument is a settlement?

The case of *Wiseman* v. *Collector of Imposts* (a) defines a settlement (in the present connection) as "a disposition of property in such a manner as to create a beneficial interest in some person in whom it did not previously exist." In the present case the testator himself did not attempt to define or limit any trusts of the shares which he desired to leave to such of his daughters as may not be married at his death, or who

(a) 21 V.L.R. 743.

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might thereafter marry before attaining 30 years of age. He vested all his property in the trustees of his will in trust for sons who attained 21, and daughters who attained that age or married under that age, and he required that his trustees should themselves by deed settle the shares of such daughters as I have referred to on such "daughter and her children," but leaving it to the full discretion of his trustees to settle the same in such "way or manner as they should appoint or think best," but stipulating that the special enjoyments and powers which the will designed for the benefit of the daughter should be provided for in such settlement as the trustees should otherwise see fit to make.

It has been argued, on the one side, that the settlement in question does no more than expressly follow the trusts of the will, and that *In re Strachan* (*b*) rules the question against the Collector of Imposts. On the other side it is contended that there are new beneficial interests created by the settlement which did not exist by the provisions of the will, in the sense intended by *Wiseman* v. *Collector of Imposts* (*c*), and that *In re Austin* (*d*) is more appropriate to the present facts, and that the settlement is liable to duty.

I think this latter view is right. It is true that all which has been done has been so done under the authority of the will, but has not been done by it, and afterwards, so to speak, photographed in the settlement, as was the case in *In re Strachan.*

In the present case the testator does not define or differentiate the several interests which are to be created by the settlement, but he leaves that to his trustees' discretion to do. He indicates a class for whom he desires that provision shall be made in the proposed settlement, viz., "his daughter and her children." If he had said no more this would be a gift to the members of this class in equal shares probably; but he goes on to instruct his trustees that, in exercising their discretion, they are to so arrange that his daughter shall have the whole income for life, and shall have the right to deal absolutely with one-third of the capital in any event, and to do the like with the

(*b*) [1902] 28 V.L.R. 118. (*c*) 21 V.L.R. 743.
(*d*) 27 V.L.R. 408.

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whole or such part of the capital as she shall not have previously disposed of if she be without any child or other issue when she reaches 40 years of age. These instructions to his trustees in favour of his daughter leave "her children" with inchoate but no defined beneficial interest under the will. The several provisions in favour of the daughter exclude the supposition that the testator's use of the words "upon her and her children" was meant to vest anything in the children, but merely to give them a contingent interest of a degree and kind to be defined by the trustees when they come to "settle and assure" the share. Their interest, whatever it might be, was to be postponed till their mother should die, and was to attach to the whole, or to two-thirds only, of the capital, according as their mother should or should not dispose of the other one-third part; and it was left to the trustees to say what interests the children should severally take. By the settlement as actually made the trustees settled it in trust for such of them as being sons or a son should attain 21 years, or being daughters or a daughter should attain that age or marry under that age, and if more than one in equal shares. This leaves the vesting of any interest in the children contingent on attaining 21, or in the case of daughters marrying under 21; and it leaves the *quantum* of interest of each child contingent also on how many of them should reach 21 or marry under that age.

In my opinion this is a distinct creation or limitation of an interest by the settlement which did not exist before. Mr. Cussen argued that the words of the will which directed that a married daughter's "share be settled and assured upon her and her children . . . . 'in such way and manner' as his trustees . . . . should in their discretion appoint or think best," meant only that the trustees should have discretion as to the conveyancing method of carrying out the testator's own trusts. The answer, however, to this appears to be that the will directs that the settlement shall be "by deed," and he does not attempt to even indicate any exhaustive, or indeed definite trust of the share himself, but simply indicates, as by way of instructions, some things which he desires to be provided for in the trusts which the trustees should in their discretion limit and create.

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The case of *Gowan* v. *Gowan* (*e*), decided in England, shows that where in a somewhat similar case the Court directed a settlement in pursuance of a testator's desire, the settlement ordered was held liable to stamp duty as such.

I think the questions put by the special case should be answered—(1) Yes; (2) 21*l.* 1*s.* The Collector of Imposts should have his costs, to be taxed.

Solicitor for the trustees: *G. P. Newman.*

Solicitor for the Collector of Imposts: *Guinness*, Crown Solicitor.

H. I. C.

HODGES, J.

1903
April 21, 24.

ABBOTT *v.* MORRIS *and Others.*

Will—Life tenant—Licensed premises—Licence of hotel—Repairs.

A testator by his will directed his executor to pay to or permit his wife to receive the rents and profits of or to otherwise enjoy his real estate for her life, with power to the executor, with the consent of the wife, to lease the real estate. The rents and profits were to go to two sons of the testator after the death of the wife, and upon the death of the surviving son the executor was directed to sell the real estate and to pay the proceeds to the Alfred Hospital.

The testator was at the time of his death a licensed victualler, and carried on such business at the hotel on his real estate, which consisted of one block.

After his death his widow continued to carry on the business of a licensed victualler in the same premises. Questions having arisen as to the administration of the estate,

Held, that it was the intention of the testator that the premises should be continued as licensed premises, and that the widow was under an obligation, so long as she continued in occupation, to keep up the license, and fulfil the requirements of the *Licensing Act* 1890, or else she should withdraw from occupation, and allow the trustee to lease the premises as licensed premises.

Held also, that the trustee, in the event of the widow withdrawing from the occupation of the premises, was under an obligation to keep up the premises as a going concern, and to preserve the licence.

The licence is attached to the premises, and so long as the hotel was carried on by the widow it belongs to her solely, but upon her withdrawal from occupation, it, being attached to the premises, goes to the trustee, and ultimately to the remaindermen.

A tenant for life of licensed premises is entitled to be recouped out of *corpus* for moneys expended in improvements to the building which are of a permanent nature, but ordinary repairs must be made by the tenant for life at her own expense.

ORIGINATING SUMMONS.

This was an originating summons referred to Court. The plaintiff was the executor under the will of Richard K. Bancroft,

(*e*) [1880] 17 Ch. D. 778.

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deceased. The testator, Bancroft, who was a licensed victualler, by his will directed his executor to pay to or permit his wife, Elizabeth Bancroft, "to receive the rents and profits of or to otherwise enjoy my real estate for the term of her natural life with power to my said executor with the consent and approval of my said wife during her lifetime and afterwards at his sole discretion to lease my said real estate or any part thereof for such period for such rent and upon such terms as my said executor shall deem advantageous." After the death of the wife the rents and profits were to go in equal shares to two sons, and upon the death of the survivor the executor was directed to sell the real estate, and to pay the proceeds to the Alfred Hospital.

The personal estate was given to the widow of the testator. The real estate of the testator consisted of a block of land at Sandringham, upon which was a hotel, in which the deceased had carried on the business of a licensed victualler. Part of the personal estate had been used in paying the debts of the deceased, and a mortgage had been raised upon the real estate for certain purposes. The widow of the testator carried on the business of a licensed victualler at the hotel, and the licence was in her name. The hotel premises were not in good repair at the time of the death of the testator, and the widow had from time to time spent large sums of money in repairs and improvements. Some of the repairs were made in consequence of written notices from the licensing inspector under the provisions of the *Licensing Act* 1890. The widow had married again, and was the defendant, Elizabeth Morris. An originating summons was taken out by the executor asking a number of questions arising in the administration of the estate. The following questions were material to this report:—"Is the defendant Elizabeth Morris entitled to be repaid out of the estate the cost of any of the improvements, alterations, and repairs to the hotel set out in the affidavit, and if yea, a declaration as to the principle upon which the same are to be ascertained?" "Does the licence mentioned in the affidavit belong to the defendant Elizabeth Morris solely, or ought it to be treated as annexed to the hotel, so as to pass to the person entitled for the time being to the receipt of the rents and profits of the hotel?" "Is the defendant

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Elizabeth Morris under any, and if yea, what obligation to maintain the licence or to make any outlay upon the hotel required from time to time by the licensing authorities?" "What is the duty, if any, of the plaintiff as to the maintenance of the licence of the said hotel, and as to any outlay upon the hotel required from time to time by the licensing authorities?"

Upon the question of the amount to be allowed to the defendant Morris for improvements and repairs it was by consent of all parties agreed that the sum of 100*l.* should be allowed to her out of the capital.

A. H. Davis for the plaintiff stated the facts.

Vasey for the defendant Morris—The defendant is entitled to be recouped for all repairs made to the hotel premises under the requirements of the Statute. The remainderman is not entitled to have the property permanently improved at the sole expense of the life tenant.

Moule for the defendant the Alfred Hospital—The life tenant takes possession of the hotel premises as a going concern, and she is bound to maintain such premises as licensed premises in accordance with the requirements of the Act—that is, while she is in possession. If the plaintiff places some other person in possession, and pays the rents to the life tenant, then the plaintiff is under an obligation to maintain the licence and the licensed premises. The testator intended that the premises should be kept up as licensed premises. The licence is attached to the premises, and is not part of the personalty. If the whole property were sold, and as appears in the affidavits a large sum is fixed as the value of the licence, the defendant Morris could not claim such sum under the gift of personalty.

[HODGES, J. Certainly she could not.]

Counsel referred to the following cases upon the question of the licence:—*Kelly* v. *Montague* (*a*); *Booth* v. *Curtis* (*b*); *Anthoness* v. *Anderson* (*c*).

(*a*) [1892] 29 L.R. Ir. 429. (*b*) [1869] 17 W.R. 393.
(*c*) [1888] 14 V.L.R., p. 137.

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HODGES, J. I think the testator under this will left this property to his wife for life, with the intention that she should continue to keep it as it was at the time he died, and that she should preserve the licensed premises as a going concern. Consequently the life tenant is under an obligation to observe the law with regard to the licensing requirements; she must keep up the licence by applications for renewal and so forth as long as she remains directly in receipt of the rents and profits. I say *directly* in receipt of rents and profits as distinguished from the case when she may only receive the same through the trustee.

With regard to the outlay upon the premises, I am of opinion that she is under an obligation to make the outlay required to keep the hotel licensed, or else she is under an obligation to withdraw from occupation herself and allow the trustee to manage it. So long as the life tenant remains the licensee the licence belongs to her solely, but after her death or upon her giving up the tenancy of the hotel, the licence is indirectly attached to the premises, and at the disposal of the trustee or remainderman as the case may be.

As to future repairs, I do not know whether it is necessary to determine how she is ultimately to be recouped for outlay, because so much depends upon the nature of the work upon which the outlay is made. If it is work of a permanent nature, new work and permanently improving the premises, my opinion is that she would be entitled to be recouped therefor out of capital. If it were ordinary repairs necessary for keeping up the hotel in the condition it was at the time of the testator's death, or work not of a permanent character, she would have to pay for the same herself.

I think also that the trustee is under an obligation to keep the premises as a going concern, and to take such steps as may be necessary to prevent the licence from being forfeited.

I answer the question in accordance with the opinion I have expressed.

Solicitors for plaintiff: *Abbott & Beckett.*

Solicitor for defendant Morris: *Eales.*

Solicitors for the Alfred Hospital: *Moule, Hamilton & Kiddle.*

W. H. M.

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HODGES, J.

1903
June 25.

In re PHILLIPS.

Administration and Probate Act 1890 (*No.* 1060), *s.* 40—*Sealing probate in Victoria —"Executor and administrator therein named," meaning of.*

The words "executor or administrator therein named," in sec. 40 of Act No. 1060, include the person named in the probate, although he is not named in the will.

An attorney under power of an executor, where such attorney has obtained probate in another State, is an "executor named therein" within the meaning of sec. 40.

APPLICATION under sec. 40 of the *Administration and Probate Act* 1890 on behalf of the executor named in the codicil, and the attorney under power of the executor named in the will, to both of whom probate had been granted in South Australia that the seal of the Court should be affixed to the probate granted in South Australia. The Registrar furnished His Honor with the following written statement of the facts, and his reasons, for refusing to affix the seal to the probate:—"This is an application to seal in Victoria a probate of a will granted in South Australia to Ernest William Howard, the executor named in the codicil to such will, and to Nathaniel Alexander Knox, the attorney under power of Francis Elliot Corbet Singleton, the executor named in the will for the use and benefit of the said executor Singleton until he should apply for and obtain probate of such will and codicil. Under sec. 52 of the *Administration and Probate Act* 1891 of South Australia, the Supreme Court of that State has power to grant *probate* or *administration* to the attorney of any person entitled (being out of the jurisdiction) on behalf of such person. No such grant as probate to an attorney under power of an executor out of the jurisdiction could be made in Victoria; he would be entitled to letters *c. t. a.* only, and in the case of *Buckley*, reported in 15 V.L.R. 820, the Court decided that the *Foreign Probates Act* of 1887, No. 928, now forming part of the *Administration and Probate Act* 1890, must be construed as an Act dealing with the granting of probates, etc., and that the word "shall" is directory only. This probate is produced in Victoria for sealing by one executor and the attorney of the other to whom the grant was made in

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South Australia, and the Registrar of Probates has doubts as to whether the attorney of such executor comes within the meaning of sub-sec. 1 of sec. 40 of the *Administration and Probate Act* 1890 as being an 'executor named therein.'"

Schutt in support—Sec. 40 of the *Administration and Probate Act* 1890 means that, where a Court of competent jurisdiction has thought fit to grant probate to any particular person, then the person named is entitled to have the probate sealed in this State. This will was proved by the applicants in South Australia, and therefore the attorney under power of the absent executor became the executor. Although he is not the executor named in the will, he is the executor named in the probate, and until the principal applies for probate, the attorney is the executor. Sec. 44 shows that the meaning of the words "named therein" in sec. 41 must be the person named in the probate, and not the person named in the will.

HODGES, J. In this case probate was granted in South Australia to one of the executors, and to the attorney under power of the other executor. Application was made in this State that the probate so granted should be sealed, but the Registrar has felt a doubt because the probate was not granted to the executor named in the will; he doubts whether sec. 40 applies under the circumstances of this case. That section provides:—"When probate of the will or letters of administration to the estate of any deceased person who has left any property whether real or personal within Victoria has or have been granted by any Court of competent jurisdiction in the United Kingdom or any of the Australasian colonies the executor or administrator therein named whether he be within the jurisdiction of the Supreme Court of Victoria or not may either personally or by some proctor on his behalf produce the same to the registrar and file a verified copy thereof in his office. . . . When such documents have been produced and verified copies thereof deposited as aforesaid by or on behalf of such executor . . . . such probate or letters of administration shall be sealed with the seal of the Supreme Court of Victoria." The doubt is as to whether a person, who is an

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attorney under power of an executor, and to whom probate has been granted in South Australia, is an executor "named therein" within the meaning of the section. The only document referred to in that section is the probate, and these words must therefore refer to the person named in the probate as executor. In South Australia, there being power under the law of that State to grant probate to an attorney under power of an executor, when probate is granted to him he is the executor named in the probate, and therefore he is the person referred to under sec. 40 of our Act.

I think the seal of this Court ought to be affixed to this probate.

Proctors: *Brown & McCulloch.*

W. H. M.

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October 15, 16, 17, 20, 21, 22, 23.
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February 4.

INGRAM & SONS *v.* THE INDIA RUBBER, GUTTA PERCHA, AND TELEGRAPH COMPANY LIMITED.

Trade marks—Passing off—Trade description—Different classes of goods of same manufacture and same quality—Use of word "patent" after patent has expired—Misrepresentation disentitling to relief—Damages—Injunction—Matters influencing discretion of Court to grant—Costs.

The fact that the existence of any difference between two classes of an article, which the plaintiff makes and sells with different brands and at different prices, is doubtful, or that such difference, if it exists, is so trivial as not to be generally appreciable, is no answer to a claim for an injunction to restrain a defendant who has purchased the lower-priced article from the plaintiff from placing upon such article, without plaintiff's authority, the stamp or brand which the plaintiff puts only on the higher-priced article.

The plaintiffs, a firm of manufacturers, manufactured and sold two brands of enemas at different prices. The higher-priced enema was branded "Patent No. 1474, Ingram & Son, London." The lower-priced enema (usually known as "The London") was issued and sold either unbranded or stamped "Patent Seamless Enemas; London; Manufacture Warranted," but did not bear either the plaintiffs' name or the number of the patent. The defendants, who were customers of the plaintiffs', and had purchased enemas of the cheaper class, branded them, in order to promote their sale, with a stamp containing plaintiffs' name, and similar in all respects to the stamp used by the plaintiffs on their higher-priced enemas, and sold them so branded.

In an action for damages, and for an injunction to restrain the defendants from so doing, it was proved that the two brands of enemas were in all respects practically equal, that patent No. 1474 had long ago expired, and that the

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plaintiffs had assured the defendants that, with the exception of the brand, the higher and lower-priced were precisely the same.

***Held*, by A'BECKETT, J., that the plaintiffs were nevertheless entitled to an injunction restraining the defendants from affixing the stamp or mark complained of to any enemas which had not been so stamped by the plaintiffs.**

***Kirker, Greer & Co.* v. *Maynam* ([1901] 1 N.S.W. State Reports (Eq.) 73) approved and followed.**

Question of what misconduct on the part of a plaintiff will disentitle him to an injunction discussed.

ACTION.

This was an action in which the plaintiff sought to restrain the defendant from putting upon enemas manufactured by the plaintiff, known as the London enema, and sold by the defendant, a stamp or brand resembling the stamp or brand put by the plaintiff on certain other enemas manufactured by him known as No. 1474, and alleged to be of better quality than the London enema.

The facts, so far as material to the questions of law dealt with in this report, sufficiently appear from the judgment.

Isaacs, K.C., and *Fink* for the defendant—On the admitted facts the defendant is entitled to judgment. The evidence is clear that there is absolutely no difference in quality between the two classes of enemas—in any case the plaintiffs are estopped from alleging, at least as against the defendant, that any difference does exist. Under these circumstances the Court will not grant an injunction. It cannot be an actionable wrong to pass off one article as of the same kind and quality as another article made by the same manufacturer, where those articles are in fact of the same kind and quality, and are made by the same manufacturer. There is no fraud on the public, nor is there any fraud on the plaintiff. But even if under ordinary circumstances the plaintiff would have been entitled to some relief his acts have disentitled him to any relief in this action. The brand which plaintiff uses is itself a fraud upon the public. It amounts to a representation that "Patent No. 1474" still exists as such, and also that there is a difference in quality between those enemas on which the brand is placed and those on which it is not. Both of these representations are clearly untrue: *Kerly on Trade Marks* (2nd ed.), pp. 401, 402.

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Purves, K.C., and *Cussen* for the plaintiffs—The defen by selling the lower-priced article with this brand represents merely that he is selling an enema made by the plaintiff (w is true), but the enema which the plaintiff so brands (whi false). If that be so, however slight the actual differe between the two kinds of enema, the defendant by so a misleads the public: *Cf. Hennessy* v. *White* (*a*), where it said that the effect of the act of the defendant in that case to "induce purchasers to believe that they were buying merely respondent's brandy but their bottled brandy," an injunction was granted. See also *Reddaway* v. *Banham* (*b*) *Kirker, Greer & Co.* v. *Maynam* (*c*), the latter of which s that the right to relief does not depend on expert eviden differences, but on the question whether the public prefers class of article to the other. The mere fact that a larger is obtained for one class of article than for the other is the evidence that one is more valuable than the other. The u the words "Patent No. 1474" does not necessarily imply the patent is still in existence. The addition of the nu of the patent is enough to preclude any such infer The case of *Sen Sen Co.* v. *Britten* (*d*) is very similar, e that the words used there were "Trade Mark." It was that these did not necessarily mean that the person using had any registered trade mark, nor was their use sufficie disentitle him to relief to which he was otherwise ent *Edelsten* v. *Vick* (*e*) is exactly in point. In *Cochra McNish* (*f*) the words "Under Her Majesty's Royal L Patent" were used on the labels attached to soda water b It was held that the fact that there was in reality no pate the soda water did not disentitle the plaintiff to relief. Se on this point *Ford* v. *Foster* (*g*).

On the question of costs counsel referred to *Sieg Laurence* (*h*); *Upmann* v. *Forester* (*i*).

(*a*) [1869] 6 W.W. & A'B. (Eq.) 216.
(*b*) [1896] A.C. 199.
(*c*) [1901] 1 N.S.W. State Reports (Eq.) 73.
(*d*) [1899] 1 Ch. 692.
(*e*) [1853] 11 Hare 78.
(*f*) [1896] A.C. 225.
(*g*) [1872] L.R. 7 Ch. 611.
(*h*) [1885] 11 V.L.R. 47.
(*i*) [1883] 24 Ch. D. 231.

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The following authorities were also referred to during argument:—

On the question of estoppel—*Ford* v. *Foster* (*k*); *Freeman* v. *Cooke* (*l*); *Dunston* v. *Paterson* (*m*); *Garland* v. *Jacomb* (*n*); *Cairncross* v. *Lorimer* (*o*).

On the other questions arising in the case—*Jamieson* v. *Clark* (*p*); *Brindley* v. *Scott* (*q*); *Williams* v. *Osborne* (*r*); *Jamieson* v. *Jamieson* (*s*); *Benedictus* v. *Sullivan* (*t*); *Morgan* v. *McAdam* (*u*); *Hubbuck* v. *Brown* (*v*).

Cur. adv. vult.

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A'BECKETT, J., read the following judgment:—The plaintiff in this action seeks to restrain the defendant from putting a stamp upon enemas manufactured by the plaintiff, known as the London enema, resembling the stamp which the plaintiff puts upon other enemas manufactured by him, known as No. 1474, alleged to be of better quality than the London.

The case is put thus in the statement of claim:—

2. Amongst the goods so manufactured and put on the market by the plaintiff are enemas of two qualities, such qualities being dependent upon the quality of the indiarubber used in the manufacture, and the enemas of each quality are divided into three classes, known respectively as the polished, the unpolished, and the drab; the enemas of each class of the best quality are more costly than those in the corresponding class of the second quality. The enemas of the best quality bear the name and brand of the plaintiff, and also the number 1474, thus:—"Warranted not to split; Patent No. 1474; Ingram & Son, London, England" (in oval), and are always known and asked for as Ingram's No. 1474 enema, and are sold wholesale by the plaintiff at 63*s*. per dozen, 45*s*. per dozen, and 36*s*. per dozen for the respective classes. The second and less costly kind do not

(*k*) [1872] L.R. 7 Ch. 611.
(*l*) [1848] 2 Exch. 654.
(*m*) [1857] 2 C.B. (N.S.) 495.
(*n*) [1873] L.R. 8 Exch. 216.
(*o*) [1860] 3 Macq. 827; 7 Jur. N.S. 149.
(*p*) 19 R.P.C. 255.
(*q*) [1902] N.S.W. L.R. 2 Eq. 49.
(*r*) [1865] 13 L.T. (N.S.) 498.
(*s*) 15 R.P.C. 191.
(*t*) 12 R.P.C. 25.
(*u*) [1867] 36 L.J. Ch. 228.
(*v*) 17 R.P.C. 148.

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bear the plaintiff's name or brand, or the No. 1474, but are stamped thus:—"Patent Seamless Enema; London; Manufacture Warranted" (in oval), and are sold wholesale by the plaintiff at 45*s.* per dozen, 36*s.* per dozen, and 27*s.* per dozen for the respective classes.

3. The plaintiff has recently discovered, as the fact is, that the defendant, in carrying on its business in Melbourne, is fraudulently and wrongfully passing off and selling as Ingram's No. 1474 enema to persons asking for Ingram's No. 1474 enema the said second-quality enema, and for the purpose of enabling it so to do has procured a stamp thus:—"Warranted not to split; Ingram & Son; Patent No. 1474 Enema" (in oval)—which it uses for the purpose of stamping or printing on the said second-quality and other enemas so as to enable it to so pass them off and sell them as Ingram's No. 1474 enemas. Prior to the defendant's wrongful acts as aforesaid, no other person except the plaintiff, or persons purchasing from the plaintiff the said first-quality enemas, sold or attempted to sell enemas as Ingram's No. 1474.

These allegations are denied, but it is admitted that the defendant did, in fact, cause a stamp to be made such as the plaintiff describes, and did stamp London enemas with that stamp. The defence is that the London enemas are in all respects the same as those which are described by the plaintiff as the best, or No. 1474, enemas, except that they are differently stamped, and that the plaintiff deliberately assured the defendant that they were the same when the defendant first began to purchase London enemas from him. The charge that the defendant has been passing off and selling the London enemas as No. 1474 at the higher price which the No. 1474 could have been sold for has not been sustained. I find that the defendant has, without permission, put the stamp objected to on the London to promote the sale of the London, and to denote its qualities, but not to fraudulently pass it off as the No. 1474, or to obtain the price from trading or retail customers which would have been asked for No. 1474. This stamp so used is the same as that used by the plaintiff for the No. 1474, except that the word "enema" is in the defendant's stamp substituted for the

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words "London, England," in the plaintiff's. There can be no doubt that the use of this stamp is calculated to lead to the supposition that the enema bearing it is of the same kind as the plaintiff's No. 1474. Its use would enable the enema to be passed off as a No. 1474, and would cause the two classes to be confused with one another. Supposing that there were any real distinction between the two classes, that one was substantially better or more costly than the other, the plaintiff would have an undoubted right to restrain the defendant from putting this stamp upon the inferior class, and might sustain real injury, which should be compensated by damages. The defendant avers that no such distinction exists; that the London is just as good in every way as the No. 1474; that the plaintiff imposes upon the public by pretending that one is better than the other; that his stamp on both falsely states them to be protected by patent when the patent has expired; and that the real grievance of the plaintiff is that the defendant's use of the stamp interferes with the imposition which he practises upon the public by pretending that No. 1474 is better than the London. It also contends that the plaintiff, having deliberately assured it that the quality of the one is the same as the quality of the other, is estopped as against it from asserting that any difference exists. It is clear that an assurance to this effect was given by the plaintiff to the defendant. After the patent had expired, the plaintiff, to meet increased competition, made the enema branded "The London," to be sold at a lower rate than had been charged for the 1474. The plaintiff wrote to defendant on the 2nd July, 1895:—"We beg to quote you for seamless enemas precisely the same as our special patent 1474, which enemas we have produced in order to meet the competition of other houses. We are branding this enema the London enema, but can supply them without brands if required." The supply of unbranded enemas was afterwards the subject of correspondence, and the plaintiff declined to execute further orders for the defendant, and in a letter of the 12th of August, 1896, incidentally wrote of their first and second quality enemas. (His Honor read the letters in question, and examined the evidence as to difference in quality, concluding thus)—The defendant called before me experts of

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various kinds, to prove in various ways that there is ascertainable difference in the qualities of the London and No. 1474. I accept their conclusions. They prove little m than what Mr. Ingram had already admitted, that experts wo fail to detect any difference between the two.

Coming then to a case in which the superiority of one cl is doubtful, and, if it exists, is so slight as not to be gener appreciable, the question arises as to whether a manufactu can restrain the putting of a stamp upon what he calls second class, which stamp he puts only on what he calls first class, for which a higher price is paid. A sim question came before the Court in New South Wales: *Kir Greer & Co.* v. *Maynam* (*w*). The plaintiffs sold whi in bulk and in bottle. They sought to restrain the defend from putting a label on bottles in which he bottled tl bulk whisky similar to that which the plaintiffs used for tl bottled whisky. One defence was that the defendant not passing off the plaintiff's second class as their first c whisky, because they were practically identical. Experim in Court failed to distinguish one from the other. Simp C.J., in Eq., in granting the injunction, said :—"I hold t though there is not much difference between the two, whisky bottled by the plaintiffs is slightly superior to t bulk whisky which is bottled by the defendant. The matte however, not one, in my opinion, depending on expert evide The real test is whether the consumers—that is, the public—pr one to the other. As it is admitted that the plaintiffs do a la trade in their bottled whisky, and that this whisky sells for a bottle, and the whisky bottled by the defendant sells for 4s a bottle, the public must consider the whisky bottled by plaintiffs worth the extra money." Here it appears that a the London was on the market the public continued to pa higher price for No. 1474, and the plaintiff is substanti interested in maintaining the distinction thus recognized. therefore think I should restrain the use of the stamp w tends to destroy it. Where a manufacturer asserts that the a difference between two classes of his goods, and gives evid

(*w*) N.S.W. State Reports, vol. i. (Eq.), 73.

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of slight differences, his complaint that a mark which he reserves for one class is put upon the other should be entertained. The person whose unauthorized act may bring about a confusion between the two should not be allowed to continue it because he asserts and proves that the difference between the two classes is trivial. Its triviality is a matter between the complainant and the persons who deal with him, though they may be induced to pay a higher price for what is in essentials no better than they could get for a lower. The defendant does an illegal act in confusing or obliterating a distinction which the manufacturer wishes to preserve. If it desires to enlighten the public on the subject, it must do so by other means.

But the defendant says that, admitting the general rule to be as I have stated it, the plaintiff's demerits are such that he is not entitled to relief. The first ground of objection is that the word Patent, No. 1474, is used on the imitated stamp when that patent has long ceased to exist. Misrepresentation to the public on such a subject may preclude a plaintiff from relief. I have been referred to a number of authorities upon this subject. The effect of them appears to me to be correctly stated in *Kerly on Trade Marks* (2nd ed.), p. 401 :—"The authorities do not seem to have established any more definite rule than that it is in each case a question whether or not the employment of the word (patent) makes a false and deceptive claim to a non-existent patent right for the goods." Of course, there is no deception where the word patent has been attached to the goods, as with patent leather boots. That is not this case. The use of the word is not deceptive where there was a patent under which the goods were made, and the word is read as referring to that fact, without implied assertion that the patent is still subsisting. What amounts to such an assertion, and what has been taken to negative it, have been decided by Judges according to their own views of the effect of the word in each case, in relation to other words or facts. No broad general rule can be laid down. It would be too much to expect that the word patent, honestly used as part of a stamp or label on goods made under it, should be removed when the patent had expired. Patents are known to be short-lived by anyone interested in the subject. The mere

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presence of the word ought not to lead any person to say wh he reads it, "This patent is now in force." The reference to number of the patent in the present case would enable anyo interested in the subject to ascertain the date up to which it w in force. In *Morgan* v. *McAdam* (x), V.C. Wood observes th with reference to the word used as to an expired patent "Persons inclined to act with scrupulous honesty would ta care to put the date of their patent, which would obviate difficulty." Without attributing this inclination to the plaint I think the reference to the number may be accepted negativing an intention to deceive the public as to continuance of the patent. I acquit the plaintiff on t charge.

Another charge against the plaintiff is that, by adverti ments, circulars, invoices, and labels, he falsely represents to t public that the "London" and all other enemas made by h according to Patent No. 1474, are not made by him, or are made according to the said patent, unless they are stamped 14 I think this charge proved. In the box in which the 1474 sold, the following label is inserted:—"Caution.—Unless t enema in this box bears Ingram's name, or Patent 1474, it is a genuine Ingram's Patent Seamless Enema." So in adverti ments of the No. 1474—"Caution.—Ingram's patents are t only enemas made without ribs. None genuine unless stamp with number of Patent 1474." Misleading statements of simi character are used in price lists, circulars, and other forms advertisement. The plaintiff's excuse is—"No. 1474 is bet than any other enema. We only tell the public that they w not get our best enema unless they get our stamped No. 147 This excuse does not satisfy me. The fair interpretation of statements referred to is that there is difference in mode manufacture, as well as difference in quality, between the tw The London is undoubtedly unjustly disparaged. If it were individual, it could clearly succeed in an action of libel agai the plaintiff, and would be entitled to heavy damages for fa and injurious statements as to its character. Then I have consider whether a plaintiff who falsely states differen

(x) [1867] 36 L.J. Ch., p. 228.

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between two classes of his goods, and exalts one at the expense of the other, should be permitted to restrain the use of a trade mark which he puts upon the unduly exalted goods. I think the interests of trade morality would not be advanced by closing the door against such a suitor. The defendant has infringed his right, and the deception which the plaintiff has attempted upon the public is not with regard to the goods as to which the protection is sought; it relates to other goods and their relative qualities compared with those of the goods to be protected.

As to damages, I doubt if the plaintiff has sustained any from the defendants' acts. To cover any which may have been occasioned, I award 5*l*. As to costs, I have been referred to cases in which defendants were restrained from using or retaining on their goods trade marks which, so far as they were concerned, had been quite innocently attached. They have offered to remove the marks, and to consent to any terms for the plaintiff's protection, but have declined to pay costs. These they have been ordered to pay in circumstances which savoured of hardship. In each of these cases the defendant may be said to have been blameless, but so was the plaintiff. He was exercising his legal right, and no misconduct in relation to it was attributable to him. The position of the plaintiff here is widely different. His false statements to the defendant and to the public do not justify what the defendant has done, but extenuate the offence. I have hesitated as to whether, in view of the plaintiff's misconduct, the Court should give judgment for the plaintiff on any terms, but in deciding to grant the injunction I feel that I can properly exercise my discretion in refusing costs. Order that the defendant, its agents and servants, be restrained from affixing the stamp in the statement of claim mentioned, or any other stamp or mark bearing the figures 1474, to any enemas which have not been stamped by the plaintiff as No. 1474. That the defendant deliver up to the plaintiff any enemas now in its possession bearing an impress from such stamp other than enemas which the plaintiff has stamped as No. 1474. That the defendant deliver up to the plaintiff the said stamp. That the defendant pay to the plaintiff 5*l*. in

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satisfaction of the damages sought by the statement of claim. That the parties respectively abide their own costs of this action. Liberty to apply.

Solicitors for plaintiffs: *Waters & Crespin.*
Solicitors for defendant: *Fink, Best, & Hall.*

J. M.

A'BECKETT, J.
1903
March 24, 25.
F.C.
June 10, 11, 26, 29.

HELIDON SPA WATER CO. *v.* HAMLYN SPA WATER CO.

Trade marks—Passing off goods—Trade name or description—"Get up" common to the trade—Labels, etc., calculated to deceive.

A person who commences to trade in goods properly bearing the same or practically the same trade name or description as the goods of another who has been using that trade name and description is under a special duty to actively guard by the get up, etc., of his goods against the possibility of their being mistaken or bought for the goods of that other.

The plaintiff had for years bottled and sold a mineral water under the name of "Helidon Spa Water." The defendant commenced to bottle and sell similar water under the description "Spa Water from . . . . Helidon."

Held (reversing the decision of A'BECKETT, J.), that, even assuming that the defendant had the right to so describe its water, it came within the above rule, and was bound to employ labels, get up, etc., so dissimilar that there would be no possibility of its goods being mistaken for those of the plaintiff.

ACTION.

This was an action in which the Helidon Spa Water Company claimed—(*a*) an injunction restraining the defendant, the Hamlyn Spa Water Company, from passing off mineral water not bottled, got up, or sold by the plaintiff as or for that of the plaintiff, or from enabling others to do so; (*b*) damages; and (*c*) delivery up by the defendant of all circulars, labels, show cards, cases, bottles, cart, etc., so got up as to enable mineral water not bottled, got up, or sold by the plaintiff to be passed off as and for that of the plaintiff.

It was alleged by the plaintiff that for a period of about ten years prior to this action it had offered for sale and sold in Victoria a mineral water known as Helidon Spa Water in bottles and cases of a peculiar and distinctive shape, with distinctive labels thereon; that prior to the alleged wrongful acts of the

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The following are *fac similes* of the labels of the plaintiff and defendant respectively :—

HELIDON SPA WATER

FROM THE

NATURAL SPRINGS OF HELIDON

COPY OF ANALYSIS

AWARDS.

LONDON 1886

MELBOURNE 1886

BRISBANE 1890

THE HELIDON SPA WATER Co. BRISBANE — TRADE MARK — QUEENSLAND

Chloride of Sodium	grains per gal	2·99
Carbonate of Sodium		212·14
Lithium		2·68
Calcium		7·35
Magnesium		3·39
Silica		0·29
	Total	228·84

AWARDS.

LONDON 1886

MELBOURNE 1886

BRISBANE 1890

This water contains more Lithia than any of the European Spa Waters and is also much richer in Carbonate of Sodium

Jremain, Yours truly,
Will A. Dixon, F.I.C., F.C.S.

EXCELLENT ALONE OR WITH WINES OR SPIRITS

THIS BOTTLE SHOULD BE LAID ON ITS SIDE

GUARANTEED TO BE HELIDON NATURAL WATER

SPA WATER

From the Proprietor's

NATURAL SPRINGS,

HELIDON, QUEENSLAND.

Copy of Analysis.

Carbonic Acid Gas.	*Quantity.*
Lithium Carbonate	*2.00 grs. per gal.*
Sodium „	*177.00* „ „
Calcium „	*9.50* „ „
Magnesium „	*1.00* „ „
Sodium Chloride	*37.80* „ „
Potassium „	*5.00* „ „

HAMLYN'S SPA WATER TRADE MARK HAMLYN'S SPA WATER COMPANY HELIDON NATURAL SPRINGS

HAMLYN'S SPA WATER COMPANY,

GORDON PLACE (*Near Princess's Theatre*), MELBOURNE.

BRIGHT, SPARKLING AND EFFERVESCENT

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defendant no other person had sold mineral water in Victoria under the title of Helidon Spa Water, or used for the purpose of trade bottles, cases, or labels similar to those of the plaintiff; that the plaintiff had recently ascertained that the defendant company was selling mineral water not bottled, got up, or sold by the plaintiff as Helidon Spa Water, and was applying labels similar to those of the plaintiff to bottles and cases similar to those of the plaintiff containing mineral water, and by reason thereof, and of words painted on the defendant's delivery cart and cases, divers persons had been induced to purchase the defendant's mineral water as and for the mineral water of the plaintiff. The defendant, among other defences, alleged that for many years prior to the alleged acts complained of bottles, cases, and labels similar to those of the plaintiff were used in Victoria by various persons and firms other than the plaintiff for the purpose of trade in selling mineral water not the goods of or bottled, sold, or got up by the plaintiff; that the bottles, cases, and labels used by the plaintiff were in all material respects common to the trade in mineral water; that the use of the word "Spa" was common to the trade in mineral waters; that the word Helidon was a geographical term signifying a place in Queensland, and the mineral water sold by the defendant was obtained from defendant's spa or spring at the said place; that plaintiff had therefore no exclusive right to the use of the words "Helidon" and "Spa" either singly or in combination. Defendant also denied any passing off or anything in the get up of their bottles, labels, etc., enabling others to pass off their goods as those of the plaintiff.

The findings of fact appear in the judgments of A'Beckett, J., and Madden, C.J.

Coldham and *Cussen* for the plaintiff.

Isaacs, K.C., and *Winnecke* for the defendant.

March 25.

A'BECKETT, J. I should have reserved judgment in this case but for the judgment of the learned Chief Justice of Queensland in the case of the *Helidon Spa Water Co.* v. *Campbell* (reported in vol. x. of the *Queensland Law Journal* at p. 1),

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which has been given on what I think is the turning point of this case, and with which as regards that turning point I agree. I am aware that in that case the right was asserted more broadly than it is here, and it was associated with the assertion of the right to prevent the use of labels alleged to be, but found not to be, imitative, and that there are various matters in which the right asserted in that case was in excess of any right asserted here; but looking at the pleadings in this case the right which I take to be asserted is the right to prevent any person saying that he is selling Helidon Spa Water; and that right is based upon the fact, which I take to be a fact, that the plaintiff has for some years been selling Helidon Spa Water that comes from the Helidon district, and selling it under that name, and that by the use of that name it has become descriptive of the plaintiff's goods, and has become associated with him. But the question to be considered is whether, although it has been so descriptive, another person had no right to use it; whether the one follows from the other, and that, having become descriptive of his goods, no other person can use those words. That is the point, the kernel of the judgment to which I refer. At p. 11 His Honor says:—"Helidon Spa Water is really the name of a class of things—that is, natural mineral waters from the district of Helidon—so long as there was only one species of that class," etc. (His Honor read from p. 11 of the report.) And then in another part of the judgment this occurs:—"When a man produces or invents," etc. (His Honor read from the report.) The plaintiff being at one time the only person who sold Helidon Spa Water the name or the words "Helidon Spa Water," had become associated with his goods, but that I think does not give him the right to restrain the use of those words if those words are properly descriptive of some natural product coming from a specified locality to which the word "Helidon" refers. No one pretends that this is a fancy name. It is a name which, according to the plaintiff's own advertisements, was adopted to inform the public of the place from which the water comes. There is on the bottle "Helidon Spa Water, Natural Springs of Helidon," and then, in some of his advertisements, he says—"This is mineral water which is

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bottled at the spouting springs at Helidon, 70 miles from Brisbane." It is true that in his judgment Griffith, C.J., says he has not considered what the meaning of the words is in another place—"We must consider what the meaning of the words is in Queensland"—and I quite accept the position that what we have to consider is what that means in Victoria, and I say that it means the same thing in Victoria as it does in Queensland, a reference to the place that the water comes from, more or less known, the plaintiff doing, I won't say all in his power, but desiring to make it known and making it part of his advertisement of this water which he bottles and sells, that it comes from Helidon and is Spa water. So that in that respect I think we are on the same footing here as the litigants were in Queensland, that the known reason for the name being given to it here is the same as it is in Queensland. It is known as Helidon Spa Water, and it is also known that Helidon is the name of a place in Queensland. It is as little a fancy name here as it is in Queensland. I need not repeat that while the plaintiff was the sole producer his were the only goods that were known by that name.

Then, that being the state of facts, we have to look at the character of the complaint made by the statement of claim in this action, and looking at that statement of claim I find it to be an assertion of the right to use this name as a kind of proprietary name—that is, something which the plaintiff can use and which other people cannot legitimately use, at all events without taking care to prevent the possibility of a mistake between what they sell and what the plaintiff sells, treating the words "Helidon Spa Water" as something in which the plaintiff has a kind of proprietary right to say "That is mine, and you must not use it, or you must only use it under certain conditions." That, I think, is the fair interpretation to be put upon the statement of claim. The plaintiff's pleadings are clear enough and need little interpretation. They assert in paragraph 2 that the plaintiff has been selling mineral water known as Helidon Spa Water, and that nobody else had sold under the title "Helidon Spa Water," that the plaintiff has recently ascertained that the defendants are selling Helidon Spa Water

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and are applying labels similar, and so on, and then he seek
injunction in general terms, taking almost any view that ma
taken of those facts. Then he specifies "the delivery
labels," and so on, as calculated to deceive, and so on—I am
putting it in his exact words. It comes to this, passing of
goods of the plaintiff as the goods of the defendant, passin
mineral water not sold by the plaintiff as the goods o
plaintiff. As a matter of fact, looking at the evidence, u
the use of the word "Helidon" or "Helidon Spa W
is passing off, and the description of this water as He
Spa Water is not permissible, I do not find anything
can be said to be an attempt to pass off the defen
goods as the plaintiff's goods, as they are called. I
them both upon these pleadings and upon the eviden
be appropriating a natural product and bottling it,
they both describe the natural product by the same w
but the arrangement of those words is often different.
words "Helidon Spa Water," as they stand on the e
before me, are not to be found upon the defendant's bottles;
do occur on some of the cases, but, apart from the referen
the place that the water comes from, I do not find anythi
the bottles, labels, or get up of such an imitative character
be restrained by injunction. Of course, if the defendant h
right to use the name, the injunction should go against hi
I am assuming for the present that the use of this is
reason why I should grant an injunction against him. Th
in the general get up common to these and other mineral w
a similarity which is common to all, as there is with many
of the same description. There is a sort of general resemb
in champagne or brandy bottles, and so on, and in regard t
particular merchandise I have had several specimens befor
and there is a strong family likeness between them all,
certainly find that, supposing the duty laid upon the defe
because he used those words to prevent any possibility o
bottle being mistaken or used for another—if any responsi
of that sort devolved upon him, undoubtedly he has fail
recognize it; and I have no doubt that he has profited b
general similarity of his goods to those of the plaintiff, and b

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aintiff had extensively advertised that which the
nly lately come to sell. I have no doubt he has
advantages, and that he has not been desirous, to
it, that there should be any startling difference
of his bottles to inform the public that the stuff
vas not the property of the plaintiff. One piece
ed, which was placed inside cases, was undoubtedly
some reason or other it is not a specified subject
nd I do not think that I should regard this as
iew of what is complained of or as affecting

there has been no imitation—no attempt at
tle resemble the other bottle. The defendant does
is goods in such a way as to cause them to be
e plaintiff's goods, because so far as the advertise-
is on the bottles states it is indicated as plainly
at it is the production of the Hamlyn Spa Water
address is given; that the name given is Hamlyn,
the defendant, I regard as quite immaterial, and
xplained by a man called Hamlyn having been a
t used the water in this particular spring for the
ofit. The fact that it has been bottled by a
altogether from the plaintiff is clearly apparent
notice, label, or placard that has been produced,
m they unmistakably describe it as his product,
and has bottled it after subjecting the natural
ocess which makes it marketable, so that in that
not in any way attempt to pass off his goods as
e plaintiff. I am satisfied by the evidence that
ons, who get a general idea that they would like
he plaintiff used to sell, got what the defendant
I do not think that that result is brought about
should subject the defendant to the interference

view which I take of the case as presented,
e as presented I think there should be judgment
ant, with costs; but I wish to say, in order
ot be misunderstood, that supposing another

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view had been presented, and that was the case which defendant had to meet, I think a different result, the very rev might occur. Supposing it were alleged that the plaintiff h spring in Queensland which produced water of certain prope and he sold that as Helidon Spa Water, and his spring known as Helidon Spa and obtained a wide reputation as and that water from it was largely sold in Victoria by name, and all that were perfectly true, and if the w complained of were that the defendant had purchased the to get water from another spring in the same district, b altogether different character, varying materially i properties, and had mentioned, what may or may not ex certain superiority of the plaintiff's spring over the defend spring, which would make it injurious for the plaintiff's s to be mistaken for the defendant's spring, and that the defe had sold water from his spring describing it as water fro plaintiff's spring—supposing it had been put in that shape the Court were satisfied that the use of the name "He Spa" was to describe and did properly describe the s spring in which the plaintiff had a special right, and tha defendant tried to associate his inferior with the plai superior spring and did give his spring a name similar t plaintiff's spring, then I think a very different result occur. But the case does not assume that shape by any m It says nothing of where the plaintiff's water comes fro where the defendant's water comes from, and bases no upon the confusion arising through the plaintiff's waters co from one source and the defendant's waters coming from an source represented as being the same. It does not claim rights depending on the difference which may exist betwee two descriptions of water. It does not base rights upon It bases the right upon the mere statement that the defe is trying to pass off his goods, as they are called, as the plai goods. It does not make such a case as I say might perha made, and which would require grave consideration before dealt with in the way in which I have dealt with the pr case. I deal with the present case as if both waters, so far a Court was informed, had come from a common source, as

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the Helidon River, and as if the plaintiff had called it "Helidon River Water" first, and having been known by that name had the right to prevent any person who took any water from the Helidon River calling his goods "Helidon River Water." The distinction between the two cases is perfectly plain, and in my view the pleadings do not make the case that I have described. The pleadings make one case and not the other, and on those grounds I give judgment for the defendant, with costs.

From this judgment the plaintiff appealed.

Cussen (with him *Coldham*) for the appellant—The test of liability is, "Is defendant making such representations that people would be likely to buy his goods as and for the goods of the plaintiff?" It is not essential that he should have any actual intention to deceive.

[MADDEN, C.J., referred to *Wolfe* v. *Hart* (*a*).]

Cope v. *Evans* (*b*) almost goes the length of deciding that proof of actual deception is almost conclusive proof that the label or other mark is so calculated to deceive as to call for the interference of the Court, unless the person deceived is an absolute fool.

He also referred to *Jones* v. *Hallworth* (*c*); *Saxlehner* v. *Apollinaris Co.* (*d*); *Jamieson* v. *Jamieson* (*e*); *Radde* v. *Norman* (*f*); *Hostetter* v. *Anderson* (*g*); *Wolfe* v. *Alsop* (*h*); *Helidon Spa Water Co.* v. *Campbell* (*i*); *Wotherspoon* v. *Currie* (*k*); *Montgomery* v. *Thompson* (*l*); *Kerly on Trade Marks* (2nd ed.), p. 249.

(Counsel were proceeding to argue in support of appellant's exclusive right to the use of the name "Helidon Spa Water," when they were stopped. The Court intimated that, subject to what it might hear from counsel for the respondent, it was satisfied that there was such a similarity as was calculated to

(*a*) [1873] 4 V.L.R. (Eq.) 125.
(*b*) [1874] L.R. 18 Eq. 144.
(*c*) [1897] 14 R.P.C., at p. 234.
(*d*) [1897] 1 Ch. 893; 14 R.P.C. 645.
(*e*) 15 R.P.C. 173.
(*f*) [1872] L.R. 14 Eq. 348.
(*g*) [1870] 1 V.R. (Eq.) 7.
(*h*) [1886] 12 V.L.R. 421 and 887.
(*i*) 10 Queensland L.J. 1.
(*k*) [1873] L.R. 5 H.L. 508.
(*l*) [1891] A.C. 217.

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mislead buyers, adding that, in the event of respondent's counsel succeeding in altering the view of the Court as to that, counsel for the appellant would be heard on the other question.)

Isaacs, K.C. (with him *Winnecke*)—The plaintiff is bound to show that the defendant has done something actively to bring about the result of deceiving. It is not sufficient if he has merely done something which *primâ facie* he is entitled to do, and that people happen to have been thereby misled. Where a word is merely a descriptive name, A. is as much entitled to use it as B., so long as he does not represent his goods as the plaintiff's.

He referred to *Jamieson* v. *Jamieson* (*m*); *Parsons* v. *Gillespie* (*n*); *Reddaway* v. *Banham* (*o*); *Cellular Clothing Co.* v. *Maxton* (*p*).

These cases all show that before any exclusive right can be acquired to use of a geographical or descriptive word the word must not only have acquired a meaning which it did not originally have, but it must have also lost its primary meaning. It must have come to denote only the goods of the plaintiff.

He referred also to *Burgess* v. *Burgess* (*q*); *Chivers* v. *Chivers* (*r*); *Aërators Co.* v. *Todd* (*s*); *Blackwell* v. *Crabbe* (*t*).

There must be an intention to deceive.

[HOOD, J. It is not a matter of intention. The question is whether it is calculated to deceive.

MADDEN, C.J. There is a special duty cast on a person commencing to trade in a similar class of goods under the same name as or a name similar to that of a person already engaged in that trade. Such a person should be especially careful to distinguish his goods. The law does not allow him to shut his eyes to the fact that people may be deceived. The learned Judge seems to have fixed his mind on the differences rather than on the resemblances here.]

Burgess v. *Burgess* (*supra*) shows that where the manufac-

(*m*) [1898] 14 *Times* L.R. 160.
(*n*) [1898] A.C. 239.
(*o*) [1896] A.C. 199.
(*p*) [1899] A.C. 326.
(*q*) [1853] 22 L.J. Ch. 675.
(*r*) [1909] 17 B.P.C. 420.
(*s*) [1902] 3 Ch. 319.
(*t*) [1867] 36 L.J. Ch. 504.

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turer of an article sells it under his own name, and the article attains great celebrity in the market under that name, the manufacturer does not thereby acquire such an exclusive right to the use of the name under which the article has been sold as to prevent the use of it, without fraud, by another person, having the same name, in the sale of a similar article manufactured by himself. That is precisely this case.

Coldham and *Cussen* were not called on to reply.

MADDEN, C.J. delivered the judgment of the Court [MADDEN, C.J., HOLROYD and HOOD, JJ.] We are of opinion that this appeal should be allowed. On examining all the points closely, the controversy which arises on the matters submitted to us seems to come down to a fairly small matter. According to the authorities cited there appears to be no doubt at all that it is open to anybody to describe that which is a natural product by the ordinary broad words of description. If the words used merely describe something by that proper and common name, anybody may so describe it, and nobody can claim to have any property in that which is necessary for universal convenience. In the present instance, at a place called Helidon, in Queensland, there are a number of natural springs. There is no reason to say that according to law the word Spa has any other more specific meaning than that it describes a spring—probably some sort of mineral spring—any mineral spring—no particular kind. Each party here bottles water which comes in each case from a separate spring at Helidon. The result therefore is that, as each of them is entitled to use the words "Helidon Spa Water," the plaintiff could not, without any special circumstance, have had any right to appropriate those words of description as applying to his goods. The plaintiff began here many years in advance of the defendant bottling and selling Helidon Spa Waters under that name. In process of so selling the plaintiff has spent a great deal of money in popularizing it with the public here; and after he had succeeded in so popularizing it the defendant came along and proceeded to bottle Helidon Spa Water and put it on the market and sell it.

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The learned Judge finds that the defendant in fact succeede obtaining considerable advantage from the plaintiff's adverti of Helidon Spa Water—that he, the defendant, has not bee any pains, to say the least, to inform people that when bu his water they are not buying the plaintiff's largely advert and popular water. His Honor then goes on to draw conclusion that, if there be any obligation on the defendan make any discrimination so that the public buying either w know which they are buying, the defendant has certainly done so. But His Honor concludes that the defendant is obliged to do so. His Honor says—"I certainly find supposing the duty lay upon the defendant, because he these words, to prevent any possibility of one bottle b mistaken or used for the other—if any responsibility of sort devolved upon him—undoubtedly he has failed to recog that duty, and I have no doubt that the defendant has pro by the general similarity of his goods to those of the plaintiff by the fact that the plaintiff has exclusively advertised that w the defendant has only lately come to sell." So far we agree His Honor's decision. But we think this also occurs—all bottles in which the defendant's water is bottled are prec like the bottles which are ordinarily in use by the plai They are bottles which are in ordinary use among those manufacture and bottle mineral waters, and, therefore, notw standing their similarity, they are bottles which may be use another vendor. The position is, that each is selling what entitled to sell—each is describing what he is selling by a r which it properly bears—by a name by which he is entitle describe it. Each encloses the water in bottles stro resembling one another, but which each is entitled to use.

It remains then to consider what are the proper limita of such use. Any person who is entitled to do so may use a t which another man is using, but if he does so he comes under the obligation to be careful not to use it in such a fas as is calculated to lead unwary people to suppose that what selling is the property of the plaintiff, of the same kind, an bottles of the same description. In other words, in the inte of fair trade, a man who starts to use things which are com

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to the trade must take the ordinary fair course of making sure that he is making it plain to the public that he is not selling what they are accustomed to get from the plaintiff, though he is selling by the same name.

These propositions being so, it may be fairly said that if anybody saw these bottles for the first time he would see a great resemblance, sufficient to induce anybody who got the plaintiff's bottle on Monday to be satisfied with the defendant's on Wednesday. The resemblance would be calculated to deceive him, if he did not scrutinize the labels. When one comes to look at the labels, and to take them to pieces, it is a very easy thing to see that there are great differences. But that is not the point. It is not the differences but the resemblances which are calculated to delude the unwary. According to the principle of law, the points to be regarded are the resemblances and not the differences. In the present case the water is in bottles. Both are called "Helidon Spa Water," with a different arrangement of the words. On one the words are "Helidon Spa Water," on the other "Spa Water" and "from Helidon." The learned Judge has concluded that that is lawful enough. Then each bottle has a collar. That is lawful so far as the abstract idea goes. But the collar which is put on the defendant's bottles, instead of being made broadly dissimilar, goes as close to imitation of, or resemblance to, that on the plaintiff's bottles as well can be. On the latter is a cream-coloured collar and a seal; on the former, a faint pink collar. At all events, the defendant's does not differ broadly in hue, as it would if it were a vivid blue or red, so that persons would not probably mistake the collars. No doubt each is entitled to put a collar on his bottle, but the more the defendant brings his bottle to resemble that of the plaintiff the more plain becomes the danger. It is easy to use the collar and label on the bottle in such a way that there can be no mistake. With his abstinence from making distinctions, the more the defendant is to be suspected—the more danger there is of the unwary person being mistaken. In the present case, the words "Helidon Spa Water, from the Natural Springs of Helidon," are used in plaintiff's label; "Spa Water from the Natural Springs, Helidon," on the

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defendant's. But supposing a person having been supplied with the plaintiff's water on Monday, and being unacquainted with any other, asks for it on Wednesday in another hotel. If he looks at this (the defendant's) and sees it is from Helidon, Queensland, it is enough for him. He sees the bottle with the collar, and he naturally would be disposed to accept one as for the other. If he had previously gone further in investigating what he had liked before, he would see a seal or geometrical figure in an ovoid figure or shield. Again he would find himself confirmed in his impression. There, too, he finds the words "Hamlyn Spa Water, Helidon"—the word he had seen before. Then, again, if he had looked at this, he would find an analysis giving a description of the mineral water. The analysis and description are on one side and the proportions on the other. He gets this and finds the same kind of thing on either side of it.

We think, therefore, that though it is easy, upon a close examination, and with the assistance of counsel and others, for one to see many great differences, yet the unwary purchaser, seeing one on one day and the other the next, may be easily deceived into mistaking one for the other. Therefore we think that the principle on which the learned Judge has gone is wrong in so far as he thinks that a man who has a right to use a particular description, which is common property, is not bound actively to make it plain to the public that what he is selling is not the Helidon Spa Company's Water. He is not bound to affirmatively advertise that fact in so many words, but he is bound to so build up his own description that it may not be mistaken for the other. We think that His Honor has been too rigid in applying the principle, and that he was wrong in concluding that although the defendant was not bound to write on his bottles "*Nota Bene.*—This is not the Helidon Spa Company's Water," it is still open to him to make his labels, bottles, and make up generally so closely resemble those of the plaintiff as to be calculated to deceive the unwary.

Then there remains only this other question to be considered. His Honor has expressed an opinion which represents his findings on the facts. He is the Judge of the first instance, and, according

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to principle and law, a court of appeal ought to respect his findings of fact. If those findings are arrived at by him from a discrimination between the witnesses and their manner of giving *viva voce* evidence, then he has, in seeing the witnesses in the box, had an advantage which the court of appeal could not have. He is able to apply those tests to the *viva voce* evidence which can only be applied by those who see the witnesses. Therefore, when the Judge below arrives at his conclusion of fact in that way, a court of appeal ought not, according to the rule laid down in the authorities, to interfere with that finding. But where the whole matter turns upon the interpretation of documents, then the court of appeal can judge as well as the Judge below. If, moreover, the matter depends on inspection by the eyes, this court is in as good a position as the Judge below. This process of reasoning has been established in the case of *Healey* v. *Bank of New South Wales* (No. 2) (*u*). Applying that principle here, there is nothing in this case which need really trouble us at all in the *viva voce* evidence. The whole matter is this: There are the two sets of bottles, and giving every credit, as we are bound to do, to the defendant's right to use things common to trade, we can see that he has used them in such a way as will be calculated to deceive the unwary. We are entitled to say that, and seeing it, our duty then is to say that the issue which the plaintiff has put forward is established, and that the appeal should be allowed, with costs. Plaintiff is also entitled to an injunction as claimed. The plaintiff is also entitled to the costs of the trial below.

Appeal allowed.

Solicitors for the plaintiff (appellant): *Waters & Crespin.*
Solicitors for the defendant (respondent): *Corr & Rylah.*

J. M.

(*u*) [1899] 24 V.L.R. 694.

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HOCKEY *v.* THE MOTHER O' GOLD CONSOLIDA MINES LIMITED; WEDERELL, *Claimant.*

Conflict of laws—Private International Law—Movables—Mortgage execu of Victoria of goods in Victoria—Lex situs—Lex domicilii—Compan 1896 (*No.* 1482), *s.* 53—*Companies Act* 1900 (*No.* 1699), *s.* 13.

Goods in Victoria in the possession of the defendant, which was a co domiciled in England, were seized under a warrant of execution issued in V and were claimed by W. under a mortgage by the defendant company ex in England some years previously and not registered in Victoria.

Held, that title to the goods was to be made according to the law of V and that therefore the mortgage by the defendant company, not being reg in Victoria as required by sec. 53 of the *Companies Act* 1896 and sec. 13 *Companies Act* 1900, was invalid and inoperative in Victoria, and gave title to the goods.

ORDER TO REVIEW.

Certain goods and chattels had been seized under a wa of execution issued out of the County Court at Dunolly plaint in which the plaintiff was Albert Hockey an defendant was The Mother o' Gold Consolidated Mines Li a company domiciled in England and carrying on busin Victoria. The goods and chattels were claimed on beha Thomas Wederell, who was domiciled and resident in Eng and an interpleader summons to determine their ownership heard in the Court of Petty Sessions at Dunolly, when va documents (including a declaratory judgment of the Cha Division of the High Court of Justice in England, made in were tendered in evidence to show that the claimant was en to a mortgage over all the property of the defendant com Objections were taken as to the admissibility in evidence the documents referred to, and as to one of them the fu objection was taken that it "purported to be a mortgage fo purpose of securing an issue of debentures, and as no evi was produced or tendered of its having been registere Victoria in accordance with the *Companies Acts* it was inva

The justices found that the goods and chattels seized the property of the judgment debtor (the defendant comp and ordered the claimant to pay the sum of 7*l.* 14*s.* 6*d.* costs

An order *nisi* to review this decision was grante

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A'Beckett, J., upon the application of the claimant, upon the following ground:—"That upon the evidence the goods and chattels seized were the property of the claimant or subject to his rights."

Schutt to move the order absolute.

Mitchell to show cause.

The arguments material to this report are alone set out.

Mitchell—Title to the goods is to be made according to the *lex situs*. *Cf. in re Maudsley, Sons & Field* (*a*) and *Union Bank* v. *Tuttle* (*b*). Therefore the mortgage, under which the claimant seeks to make title, not having been registered in Victoria as required by sec. 53 of the *Companies Act* 1896, is inoperative and invalid: See sub-secs. (1), (2), and (19). Therefore also the declaratory judgment, which proceeds upon the mortgage, is inoperative in Victoria.

Schutt—If the law of Victoria applies at all, it is made clear by sec. 13 of the *Companies Act* 1900 that sec. 53 of the *Companies Act* 1890 requires mortgages executed out of Victoria to be registered in Victoria. The question to be determined is, What law will the law of Victoria, according to the comity of nations, apply to determine the property in these movables—whether the *lex situs* or the *lex domicilii*? Westlake favours the former view. *Cf. Westlake on Private International Law* (3rd ed.), secs. 149, 150, 151, 152, pp. 164, 168, 177, but Story seems to favour the latter view, with this exception (which is apparently adopted by Page-Wood, V.C., in *Simpson* v. *Fogo* (*c*)), that a State may by positive enactment make some special law to which the *lex domicilii* must bow.

[HODGES, J. The exception seems to cover the whole ground.]

Story seems to confine it to a statutory enactment, and not to a rule of the common law: See *Story on Conflict of Laws*

(*a*) [1900] 1 Ch. 602, 610. (*b*) [1889] 15 V.L.R. 258.
(*c*) [1860] 1 J. & H. 18; [1863] 1 H. & M. 195.

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(8th ed.), secs. 376, 380, 383–386, 390, p. 543, *nn.* (1) and (*a*); the American case of *Olivier* v. *Townes* (*d*); and *Sill* v. *Worswick* (*e*).

[*Mitchell* referred to *Liverpool Marine Credit Company* v. *Hunter* (*f*).]

In the report of that case, in L.R. 3 Ch. 479, at pp. 482–484, Chelmsford, L.C., upholds Wood, V.C., in *Simpson* v. *Fogo*.

What the Legislature means by sec. 53 of the *Companies Act* 1896 is that a mortgage, etc., if unregistered, is to be inoperative and invalid, provided the Victorian law applies.

Counsel also referred to *Brookes* v. *Harrison* (*g*) and *Cockerell* v. *Dickens* (*h*).

Cur. adv. vult.

H. I. C.

HODGES, J. In this case Hockey, the complainant, obtained judgment against the defendant company, and a bailiff under that judgment seized certain goods and chattels in the possession of the company. Wederell claimed the goods under a mortgage executed by the company, which is a company domiciled in England. This mortgage has not been registered in Victoria, and Mr. Mitchell contends that it is inoperative so far as these goods and chattels are concerned by virtue of sec. 53 of Act No. 1482. (His Honor read sec. 53.) If that section alone be looked at, there might be some doubt whether it applied to a mortgage executed in England, but, as was very properly pointed out by Mr. Schutt, that sec. 13 of Act No. 1699, which provides the time within which a mortgage executed out of Victoria must be registered, shows that sec. 53 is to apply not only to mortgages made in Victoria, but also to those made abroad. The question consequently is confined to whether the title to these goods is to be made by the *lex domicilii* of the company or by the *lex rei sitae*. It is to be noted that I am not dealing with an assignment of personal chattels of an

(*d*) [1824] 2 Martin N.S. 92.
(*e*) [1791] 1 H. Bl. 690.
(*f*) [1867] L.R. 4 Eq. 62; L.R. 3 Ch. 479.
(*g*) [1880] 6 L.R. (Ir.) 85, 88, 332.
(*h*) [1840] 3 Moore P.C. 133.

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individual as an entirety, such as takes place in the case of death, nor have I to deal with the company's capacity to assign, as its ability to make a good title may be beyond dispute, and the question is not whether it *could* have done so, but whether it *has* done so.

That depends upon whether the law of this country or the law of England is to prevail. According to the law of England the mortgage does not require to be registered; according to the law of this country, where the goods are situated, it is required to be registered. Looking at this question in the first place apart from authority, if I were to allow the claimant's title here, it would be in effect giving an advantage to foreign companies and foreigners trading here. It would enable foreigners who were trading here and foreign companies trading here to have an appearance of assets when they had no assets at all, and so to a large extent it would defeat the object of the Legislature. And to decide in that way would, in my opinion, be giving benefits to people simply because they were foreigners and advantages to companies simply because they were foreign corporations. It is not surprising therefore to find, notwithstanding early dicta to the contrary effect, that the trend of modern authority, both abroad—I mean out of the British dominions—and inside British dominions, is gradually coming into the one direction of paying greater attention to the rights acquired according to the law of the country where the goods are placed. In *Westlake on Private International Law* (3rd ed.), p. 168, it is said—"The arguments which have been used in support of the maxim *mobilia sequuntur personam*, understood as regulating dealings with movables by the personal law of their owner, cannot be pronounced satisfactory; and the reader will be prepared to find that in the present century the current of authority, out of England, has set strongly towards the application of the *lex situs* to movables as well as to immovables in all cases except those of the so-called universal assignments." In support of that view he cites *Fœlix and Savigny*, and at p. 171 says that the State courts in the United States, as appears from their decisions, are in accordance with the views of *Fœlix and Savigny*. At p. 179 *Westlake* says:—

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HODGES, J.

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"Questions as to the transfer or acquisition of property corporeal movables, or of any less extensive real rights in th as pledge or lien, are generally to be decided by the *lex si* He is there dealing with the English law.

So in *Dicey on the Conflict of Laws*, p. 535, rule 142, said—"Subject to the exception hereinafter mentioned, an rules 140 and 141, the assignment of a movable wher situate in accordance with the law of the owner's domic valid." And at p. 537 he states the "exception": "When law of the country where a movable is situate (*lex si* prescribes a special form of transfer, an assignment accordi the law of the owner's domicil (*lex domicilii*) is, if the sp form is not followed, invalid." The "exception," accurately state the law on the subject, governs the before me, and determines that in such a case as this it i *lex situs* that is to prevail. Passing from the dicta of book writers to modern authority, the case of *Alcock* v. *Smi* shows the trend of English decisions. (His Honor read the judgment of Kay, L.J., at p. 267, from the passage begi "As to personal chattels," to the passage at p. 268 ending the citation of the case *Williams* v. *Colonial Bank*.) language again governs the present case. It may be that ought to be some limitation upon the generality of the used, and that they should be applied only to cases where is a conflict between the title acquired in the country wher goods are situated and the rights of the person who has acq a title elsewhere. Restricting it to that extent, it applies t case, as I am determining the conflict of title of the judg creditor, who has caused the goods to be seized, and of a p claiming under a mortgage executed in England. I a opinion that the order should be discharged.

Solicitors for the judgment creditor: *Moule, Hamilt Kiddle* (for *Herring*, Maryborough).

Solicitors for the claimant: *Braham & Pirani* (for *N* Dunolly).

W. H. H. I. C.

(i) [1892] 1 Ch. 238.

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STEPHENS *v.* ABRAHAMS.

MADDEN, C.J.

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April 1, 2, 3, 6, 7, 29.

Commonwealth of Australia Constitution Act, 63 & 64 *Vict.*, *c.* 12, *ss.* 53, 54, 55—"*Laws imposing taxation*"—*Commonwealth Customs Act* 1901 (1 *Ed. VII.*, *No.* 6), *Part VIII.*—*Id.*, *ss.* 234, 236, 255—*Commonwealth Customs Tariff Act* 1902 (2 *Ed. VII.*, *No.* 14), *ss.* 2, *etc.*—*Effect of incorporation in of Customs Act*—*False entry*—*Genuine invoice*—*Belief*—*Penalty*—*Justices Act* 1890 (*No.* 1105), *ss.* 141, 146—*Appeal*—*Order to review*—*Jurisdiction of State Court.*

Sec. 55 of the *Commonwealth of Australia Constitution Act* provides that "laws imposing taxation shall deal only with the imposition of taxation and any provision therein dealing with any other matter shall be of no effect."

Held, by MADDEN, C.J., that the words "laws imposing taxation" in that section mean "laws for the purpose of imposing taxation"—that is, laws whose object is to impose a tax, whether at the moment, or in the future, or conditionally in the future.

Held also, that secs. 138, 139, 140, 144, and 148, and, *semble*, sec. 141, of the *Commonwealth Customs Act* (No. 6 of 1901) are "laws imposing taxation" within the meaning of sec. 55 of the Constitution; that secs. 183, 234, 236, and 255 of the *Customs Act* are provisions dealing with matters other than the imposition of taxation; and that consequently these sections and all other provisions of the *Customs Act* dealing with matters other than the imposition of taxation are void and of no effect.

Held further, that, although, as a result, sec. 248 of the *Customs Act*, which gives a right of appeal from a conviction under the Act by a court of petty sessions, is void and of no effect, nevertheless secs. 141 and 146 of the *Justices Act* 1890 (No. 1105), inasmuch as they give the Supreme Court of Victoria power (on the return of an order *nisi* to review) to quash any order of a court of petty sessions for want of jurisdiction, or on the ground that in law it ought not to have been made, apply to the case of an order made by a Victorian court of petty sessions under the supposed authority of secs. 234 and 245 of the *Commonwealth Customs Act*, and therefore that such an order is reviewable by the Supreme Court of Victoria.

A declaration "that the invoice produced is the only invoice . . . . and that the value of the goods mentioned therein is to the best of my belief the fair and real market value of the goods . . . . and that the price paid or to be paid for such goods and stated in the said invoice is the usual and ordinary price paid for such goods" is an absolute statement by the declarant of the usual and ordinary price paid for such goods, and not a statement of the declarant's belief as to such price merely.

ORDER TO REVIEW.

The defendant, Leah Abrahams, was charged on information under sec. 234 and 236 of the Commonwealth *Customs Act*, 1 Ed. VII., No. 6, before the Court of Petty Sessions at Melbourne, for that "she, on the 28th November 1901, at Melbourne, was unlawfully concerned in making a certain

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declaration, to wit, a declaration made by one Yeend, indorsed upon a Customs entry, No. 266, for certain goods imported into Victoria in the ship *Australia*, and which said declaration was on or about the said date produced to one Templeton, an officer of Customs, a statement untrue in the following particulars—namely, that the invoice produced at the time of making the said declaration was the genuine and only invoice received by the said Yeend or by any other person to his knowledge of all goods mentioned in the said entry and contained in the packages marked, numbered, and described therein, and that the value of such goods mentioned in the said entry and invoice was, to the best of Yeend's belief, the fair and real market value at which such goods were ordinarily sold at the time of shipment in the principal market or markets of the country whence the same were exported, and without any deduction because of exportation thereof, or on account of any special consideration other than such as would be allowed in the ordinary course of trade to any exporter thereof, and that the price paid or to be paid for the goods and stated in the said invoice was the usual and ordinary price paid for such goods in the country whence they were exported." The evidence and findings of the Court of Petty Sessions, so far as material to this report, are referred to in the judgment of Madden, C.J., which forms part of this report. The defendant was convicted and fined 50*l.*, with costs. An order *nisi* to review this decision was obtained, on the grounds—

(1.) That there was no evidence that Yeend did not believe his statements as to price and value.

(2.) That the declaration of Yeend upon the true construction of his declaration as to price was only to the best of his belief.

(3.) (i.) Wrongful admission of evidence—namely, (*a*) *Omrah* entry, (*b*) Eley's catalogue. (ii.) Wrongful rejection of evidence—namely, invoices on page 70 of the evidence. (Their nature is described in the judgment of the Chief Justice.)

(4.) That the Court of Petty Sessions had no jurisdiction to hear or try the said charge or information, or to convict or make the said order against the defendant.

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he matters alleged against the defendant in the ere not an offence against any Commonwealth

e provisions in any Commonwealth Act purporting e matters alleged against defendant an offence, or or jurisdiction to the Court of Petty Sessions to rmine the charge in the information against, and nake the order against defendant, were and are l and of no effect.

. (with him *Coldham*), to move the order absolute.

th him *Miller*), to show cause, referred to the horities:—*Kingston* v. *Gadd* (*a*); *Dawson* v. *ens* v. *Gollin* (*c*); *Stephens* v. *Reid* (*d*); *Stephens*); *Ah Toy* v. *Musgrave* (*f*); *Bank of Toronto* v. *vell* v. *Apollo Candle Co.* (*h*); *Knox* v. *Lee* (*i*); *tive Power in Canada*, p. 260; *Quick and Garran's f Australian Commonwealth, passim*; *Cooley on n*, p. 668; *Smith's Leading Cases* (9th ed.), vol. i., *ueen* v. *Ludlow* (*k*).

, referred to *Fairbank* v. *United States* (*l*); *Queen Lefroy*, p. 266; *Wollaston's Customs and Marine Hammell on Customs*, p. 135; *Courtney* v. *orney-General* v. *Ansted* (*o*); *Attorney-General* ; *Cargo ex Lady Essex* (*q*); *Arnold* v. *United artington* v. *Attorney-General* (*s*); *Canada*

.L.R. 417; 23 A.L.T.
.L.R. 634; 24 A.L.T.
.L.R. 242; 24 A.L.T.
.L.R. 82; 23 A.L.T.
.L.R. 753; 23 A.L.T.
.L.R. 349; 10 A.L.T.
App. Cas. 575.

(*h*) [1885] 10 App. Cas. 282.
(*i*) 12 Wall. 457.
(*k*) [1898] 24 V.L.R. 93.
(*l*) 181 U.S.R. 233.
(*m*) [1878] 3 App. Cas. 889, at p. 904.
(*n*) 1 Ld. Raym. 501 and *anon.*, *ib.*, 388.
(*o*) [1844] 12 M. & W. 520.
(*p*) [1814] 1 Price 182.
(*q*) 39 Fed. Reporter 767.
(*r*) 9 Crouch 104.
(*s*) [1869] L.R. 4 H.L. 100.

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Southern Railway Co. v. *International Bridge Co.* (*t*); *Dudley Gas Co.* v. *Warmington* (*u*); *Bank of Toronto* v. *Lamb* (*v*); *Ah Toy* v. *Musgrove* (*w*); *Regina* v. *Gibson* (*x*); *Reg.* v. *Ludlow* (*y*); *Hunter* v. *Joseph* (*z*); *Kingston* v. *Gadd* (*a*); *Quick and Garran on the Constitution*, p. 666; *Lefroy's Legislative Power in Canada*, p. 266.

The arguments upon the question raised by the 4th, 5th, and 6th grounds of the order *nisi* were repeated, with additions, before the Full Court in the subsequent case of *Stephens* v. *Abrahams* (No. 2), in the report of which (*infra*) they are set out. The arguments upon the other grounds sufficiently appear from the judgment of Madden, C.J., herein.

Cur. adv. vult.

April 29.

MADDEN, C.J., read the following judgment:—This is an order *nisi* to review the decision of justices at Melbourne sitting in petty sessions.

The complainant is the Collector of Customs for Victoria, acting as such for the Commonwealth Government. He sues the defendant to enforce the penalty imposed by sec. 234 of the Commonwealth *Customs Act*, 1 Ed. VII., No. 6, on the charge of having been unlawfully concerned in making, in a certain declaration mentioned in the information, certain false statements within the meaning of the said sec. 234 and sec. 236 of the same Act.

Sec. 245 of the said Commonwealth *Customs Act* provides that such a prosecution as that in question here may be instituted in (amongst others) any court of summary jurisdiction, and sec. 248 of that Act gives an appeal "from any conviction order for condemnation or order of dismissal to the Court and in the manner provided by the law of the State where such conviction or order is made for appeals from convictions or orders of dismissal."

The prosecution was instituted in the State Court of Petty

(*t*) [1883] 8 App. Cas. 723.
(*u*) [1881] 50 L.J. (M.C.) 69.
(*v*) 12 App. Cas. 575.
(*w*) 14 V.L.R. 349.
(*x*) [1887] 18 Q.B.D. 537.
(*y*) 24 V.L.R. 93.
(*z*) [1903] 28 V.L.R. 583.
(*a*) 27 V.L.R. 417.

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lbourne accordingly, and that Court convicted the
fined her 50*l.*, with 20 guineas costs, and in
s.

dant then obtained an order *nisi* to review that
ordinary way under sec. 141 of the *Justices Act*
tate of Victoria, on the grounds set out in that
eared that one Yeend, a clerk in the defendant's
usually passes the entries at the Customs in the
usiness, passed an entry for certain dutiable goods
ia. On it is indorsed a form of declaration which
the Customs to be made by the person who passes
was in the present instance filled up and de-
nd, who obtained the goods to which it relates
ms by its means.

f the said *Customs Act* makes the defendant,
ole for the act of her agent Yeend. It was
the prosecution that the declaration was false
ts—(1) because the declarant thereby declared
ice now produced is the genuine and only invoice
e, or by any other person to my knowledge, or
t to receive, of all the goods mentioned in this
ntained in the packages marked, numbered, and
in;" and (2) because declarant declared "that the
to be paid for the goods, and stated in the said
usual and ordinary price paid for such goods in
whence they were exported;" whereas it is
e prosecution that both these statements were in

wo grounds of the order *nisi* are—(1) that there
ce that Yeend did not believe his statements as to
e; (2) that the declaration of Yeend upon the true
f his declaration as to price was only to the best of

grounds appear to me to be unimportant, because
Customs Act provides, in complete reversal of the
edure of our Courts, it is true, but still provides,
ry Customs prosecution the averment of the
plaintiff contained in the information declaration

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or claim shall be deemed to be proved in the absence of proof to the contrary." I omit further words which are inapplicable in this case. The defendant, therefore, has to get rid of a presumption of law that the statements set out in the information here were untrue in the particulars therein set forth.

The two grounds relied on merely assume that the statements were false in fact, but suggest that the declaration of Yeend complained of was as to price to the best of his belief only; and also that there was no evidence that Yeend did not believe his statements as to price and value. This, however, is immaterial. Admitting the fact to be as the ground alleges, the statements remain false in fact by the presumption of the statute, and that is the offence. Yeend's belief does not in such a prosecution as this affect the matter. If he were prosecuted for perjury in respect of these statements his belief would be all-important; but in a Customs prosecution like this the falsehood in fact is the only thing important. Apparently the Customs department, to facilitate business, is willing to let the goods go if the person passing the entry is willing to make the requisite declaration on belief; but this does not relieve the person whose goods they are from the statutory penalty if the declaration proves to be in fact false. If the owner cannot immediately supply the essential information to the Customs, which is required to be declared on the usual entry, he may protect himself by making a "sight entry," as provided by secs. 69, 70, and 71 of the *Customs Act*. But if he, or his agent, makes a declaration on entry which is false in fact he is liable to the penalty whatever his belief may be. But apart from this, on the true construction of Yeend's declaration, both the particular statements complained of are absolute, and not to his belief only. The first one, as to "the invoice produced being the genuine and only invoice," etc., is obviously so. It was contended, however, that the other one, "that the price paid or to be paid," etc., was but a continuation of the statement "that the value of such goods, etc. was to the best of my belief the fair and real market value," etc., and so was made on belief only also. I do not think this is correct. It will be observed that each particular declaration is preceded—the first one by the word "that," and each succeeding

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one by the words "and that." These words are nearly obliterated in one place, but, looking at the similar declaration on another exhibit the remnant of the words are "and at the," and I am satisfied these are fragments of the words "and that the."

Then the statement as to price is preceded by the words "and that the," and this as a matter of English constitutes the statement a new one, and not a part only of the earlier statement. This being so, it is an absolute statement and is not made "on belief only."

The magistrates have found that both the statements as to the "invoice" and as to the "price" were false in fact, and therefore these grounds would not be maintained even if belief were any answer, which I do not think it is. The invoice tendered with the entry was what the defendant called a "house to house" invoice—that is, one which her agent in London had himself compounded from the original invoices received from manufacturers of the goods. The defendant had these original invoices, or some of them, as well as the invoice tendered, but she maintained that they did not differ in any substantial way from the statement of them in the "house to house" invoice. Perhaps this was so, and from the documents themselves it seems to be so, but nevertheless the Customs were entitled to see them for itself, and it was untrue to assert that the "house to house" invoice was "the genuine and only invoice."

As to the declaration "that the price stated in the invoice was the usual and ordinary price paid for such goods in the country whence they were exported," there was ample evidence of several expert witnesses before the magistrates that this statement could not be true.

The third ground of the order *nisi* is that (1) the magistrates wrongly admitted evidence, viz.—(*a*) the "*Omrah* entry;" (*b*) Eley's catalogue. The "*Omrah* entry" was one which Yeend had made ten days before he made the one on which the charge was founded. It was tendered as evidence that it related to, amongst others, exactly similar goods to those to which the "*Australia* entry" referred—viz., bicycle handle bars—and that the price of those was stated by Yeend, on 18th November 1901, to be 2*s.* 3*d.*, while on 28th November 1901

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he stated the price to be 1*s.* 8*d.*, and so it was contended knew well the falsehood of the statement that the price w 1*s.* 8*d.*

In tendering the "*Omrah* entry" and its invoice t prosecution undertook to prove that the goods in it we identical in character with those in the *Australia* invoi but this was not done. I think it was legally admissible, cause it was made by Yeend, and on a similar occasion to tl on which he made the entry the subject-matter of the pres prosecution, and tendered the *Omrah* invoice in relation what appeared to be similar goods; but its value as weight as evidence became nothing when the prosecution fai to show that the goods were in fact similar in both entries.

In the view that I have taken Yeend's knowledge that price in either case was false was immaterial; but if the go were shown to have been identical in character the earlier en of the *Omrah* goods might have been some evidence that price declared by Yeend was in fact false, an issue which statutory presumption under sec. 255 already established, un and until the defendant disproved it. I cannot therefore that any harm could have been possibly occasioned to defendant by this *Omrah* entry being received. This class prosecution is unlike any other, as I have said, because presumes the case established against the accused until disproves it, and no atom of direct evidence can carry t presumption further.

The next evidence objected to as wrongly received is Eley's catalogue. This was clearly properly received in opinion. Defendant's counsel was examining a witness for defendant, one Alfred Abrahams, as to the usual price of cert cartridges manufactured by Eley, and the witness said t "the list catalogue was 50*s.*," as far as he remembered. The " catalogue" of Eley was then put in in cross-examination to sh that the price was not 50*s.*, but 57*s.* 6*d.*

This was material, both as tending to show the true pric the goods in question, being goods the subject of the charge, also as contradicting the witness Abrahams by his own c authority.

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The second part of ground 3 of the order *nisi* is that evidence was wrongly rejected. This relates to a bundle of entries other than to those as to goods *ex Omrah* and *Australia*. They were stated by counsel to the Court to show that before the entry the subject of the present prosecution was passed by Yeend as to the goods *ex Australia*, he had passed entries relating to similar goods at the same or at less prices than shown in the *Omrah* entry. These were first tendered to show that Customs officers had accepted those entries without objection or complaint. They were objected to in this aspect and were rejected by the Court, and quite properly, I think. They could not be relevant in that view. Later on counsel tendered them again for the purpose of rebutting the inference which the prosecution proposed to draw from the fact that goods whose price was stated in the *Omrah* invoice and entry to be 2*s*. 3*d*. were entered *ex Australia* as at the price 1*s*. 8*d*. In my opinion the documents thus tendered were evidence legally admissible. The shorthand notes of the proceedings are very obscure as to what ensued. The magistrate presiding replied, "I think that is fair," and nothing was said in opposition, and it does not appear what was then done. The bundle was not in fact marked as an exhibit.

I cannot see how I can conclude, in view of all this, that the Court rejected this evidence wrongfully. It is clear it did reject it properly at first, but on the later application the president acquiesced as to its admissibility, and it looks as if the clerk then omitted to mark the documents, or that counsel forgot to hand them to be marked. The Court was willing, so far as I can gather, to receive them, and cannot be said, therefore, to have rejected them on this second and proper offer of them. Counsel should see that documents accepted by the Court are duly marked, or, if documents so tendered are rejected, should see that the rejection is distinctly noted.

I do not think, therefore, that grounds 1, 2, or 3 of the order *nisi* have been sustained.

A very much larger and more important question is raised by the 4th, 5th, and 6th grounds. These in effect propound respectively the same point—viz., that the *Customs Act*, under which

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the prosecution was laid, is, so far as it is applicable to and r on for that purpose, invalid.

Certain sections of the *Commonwealth Constitution* become in relation to this question of the highest importa and it has been argued before me, more especially, that words "laws imposing taxation," which occur in sec. 55 of Act, have no special constitutional significance there, but merely words which convey, in the ordinary general sense, Act of making forthwith subject to taxation," as they woul in any other enactment; and that the words are not intend be generically descriptive of a constitutional class of laws has, therefore, become necessary, and in any case it migh desirable to examine closely the history, the reason, the pur and the construction of the set of sections of the *Constitu Act*, of which sec. 55 is one, in order to get the sidelight t meaning which that course will afford.

The *Commonwealth of Australia Constitution Act*, 63 Vict., ch. 12, by secs. 53, 54, and 55, adjusts the relative po and obligations of the Senate and of the House of Represe tives respectively as to money bills, and they manifestly ai an exact statutory definition and enforcement of these rel powers and obligations.

The well-known constitutional principle that money could neither be originated nor altered by the House of Lor England, nor by the Upper House of any of the Austr colonies, is provided for by these sections, so far as the Houses of the Commonwealth Parliament are concerned, an obvious attempt has been made to prevent insidious tresp on the constitutional organic rights and powers of one Hous the other House, or by external popular pressure applied ot wise than by constitutional means.

The attempt in the several Constitutions of the sev Australian colonies was, also, in this respect, to reproduc nearly as possible the Imperial British Constitution. But u that unwritten constitution each House is, admittedly, judg its own privileges and of the extent to which it will insis them; and this fact imports into the Parliamentary system, its effective operation, an elasticity which has been though

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great value, and which at the same time has made it impossible, so long as it was fully continued, to completely express that Constitution as such on paper. The Constitutions of the several colonies, therefore, in general declaratory language, expressed the co-relation of the two Houses in respect of money bills, so far as the constitutional principle could be expressed, though there are some important differences in the extent to which it is expressed. The New South Wales, the South Australian, the Tasmanian, and the Queensland Acts affirm the exclusive right of origination in the Lower House only, while those of Victoria and Western Australia affirm both the exclusive right of origination in the Lower House and also expressly exclude the Upper House from the right of amendment. All the Constitutions left each House respectively to be the exclusive judge of its own privileges, as is the case in the Imperial Parliament. The Legislature of the several colonies, acting under authority to define the privileges of each House by Act of Parliament, though the authority differs in some instances, did define them in each case, practically to the same effect, by adopting in respect of each House "the privileges, etc., which at the time of the passing of the *Constitution Act* of the particular colony, were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, so far as the same are not inconsistent with the *Constitution Act*, whether such privileges, etc., were held, possessed, or enjoyed by custom, statute, or otherwise." The Victorian example of this authority and procedure is sec. 35 of the *Constitution Act*, and secs. 1 and 2 of the Act 20 Vict., No. 1, whose provisions are now embodied in the *Constitution Act Amendment Act* 1890, secs. 10 and 11.

To get rid of great inconvenience which arose from the restrictions on the House of Lords from the constitutional prohibition against its imposing any penalty or authorizing the taking of any fee in any bill, the House of Commons in 1831 (see 86 C.J. 477), and more definitely in 1849 (see 104 C.J. 23), altered its rules so as to permit the Lords, in specified instances, to impose penalties or authorize fees in any bill, and any proposal or amendment by the Lords, within the limits of this concession, has ever since been regarded by both Houses as no

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infringement of the rights of the Commons in respect money bills.

The same rule has, on the same authority and prac always prevailed between the two Houses of the several Par ments of the several colonies of Australia and of Tasmania.

It is matter of well-known history that in some of the Par ments of some of the colonies, before federation, disputes a between the two Houses as to the application in fact of admitted constitutional principle, and conflicts occurred in wh one House endeavoured to force its will on the other, either "tacking" some measure, obnoxious to the other House, to annual Appropriation Bill, or by including in one bill some or appropriation of which the Upper House approved, and wh the people vehemently approved, together with some other or appropriation, of which the Upper House did not appr and was unwilling to accept, and thereby placing that Hous the awkward position of defeating its own desire, and disappo ing the popular hope, or else consenting to that of which it not by any means approve.

With these principles and the remembrance of the f before them, the framers of the *Commonwealth Constitution* have evidently set themselves the task to accurately set f the true relative essentials of the constitutional principle a money bills between the two houses, and to conclusi terminate the possibility or the temptation for either house trespass, with any pretence of justification, on the privilege the other. They have done this by, in effect, stating categorical exactness the co-relative constitutional privilege the Houses in regard to the origination or amendment "proposed" laws appropriating revenue or money, or impo taxation, and as to the amendment by the Senate of "proposed" law so as to increase any proposed charge or bur on the people. The Act still leaves these co-relative rights duties constitutional rights and duties, enforceable by const tional sanctions only, as heretofore. But when any "propos law imposing taxation shall have become a "law" impo taxation, it must be such a law as shall comply with the en ments of sec. 55; and, so far as it shall not so comply, i

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to be void. Thus, what was formerly a constitutional privilege, enforceable by constitutional sanction only, is in this respect and to this extent made now a co-relative legal right and duty, enforceable by legal sanction. Hence a breach of the constitutional privilege, in the case of proposed laws imposing taxation, is made hopeless of success, and, if persisted in, its result is made void, and is required to be disregarded by the Courts.

It may be permitted to me to say that the Parliamentary perennial difficulty of the past has been, so far as I can see, solved in a masterly and practically effective way; the conditions which were desired by the constitutional principle have been perpetuated, while those which were mischievous or embarrassing to it have been finally excluded, and all in language which is concise in expression and precise to its purpose.

Thus, while expressing the exception conceded by the House of Commons in 1831, and in 1849, but extended somewhat possibly as to the appropriation of penalties and fines, sec. 53 states consecutively and clearly the constitutional incapacities of the Senate in respect of money bills, both as to their origination and their amendment, and then proceeds to give to the Senate certain definite new authorities, and concludes with a declaration of the equal powers of both Houses in all other respects.

Then sec. 54 expressly forbids any attempt by the House of Representatives to use the annual Appropriation Bill for the purpose of "a tack."

Then we reach sec. 55, which is the enactment upon which the present case turns. To fully observe the effect of this section it seems to me convenient to read its second clause first. This, for the obvious purpose of insuring that any proposed law imposing taxation shall be considered in each House on its own mere merits, unaffected by any embarrassment caused by joining a tax which is approved with one which is disapproved, enacts that laws imposing taxation shall deal with one subject of taxation only; and that even laws imposing duties of customs and duties of excise, which are more akin than are other taxes, must nevertheless be embodied in separate and distinct laws.

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It being thus provided that every tax Act shall conta but one subject of taxation, the earlier part of sec. 55 a provides that "laws imposing taxation shall deal only with t imposition of taxation and any provision therein dealing wi any other matter shall be of no effect."

So that the section in its simplest terms provides "one l one tax, and the imposition of that tax only; all else is void."

Those last words of the first clause of sec. 55 are revo tionary, because formerly, as has been said, each House of Parl ment was the judge of its own privileges—*i.e.*, had the rig without effective question, to resolve that a given bill, or a part of it, was a breach of its privileges, and to insist on tl opinion. This might, and did, lead to the rejection of measu and to deadlocks between the two Houses by reason of su rejection; but sometimes, not often, perhaps, one House yiel its opinion and the questioned measure passed; and then, ev though it involved the plainest breach of the constitutional rig of one House or other, it became unquestionable law, and had be enforced as such. Having regard to sec. 55, however, t Houses are no longer, as to laws imposing taxation, the judges these privileges in the sense referred to. Parliament is specifica forbidden to insert in such an Act anything but just enactme imposing the tax; if it introduces anything further such furtl matter is to be of no effect. Neither House, nor both of the can any longer waive anything in this respect, and the Courts considering any law imposing taxation have the duty to tr any such constitutionally extraneous matter as void.

For its Parliamentary constitutional purpose, this comple in a very valuable way the declaration and adjustment of t co-relative rights and duties of each House, because it tal away from either any temptation to misuse the other, either embarrassing it tactically, or by forcing its hand by any popu demonstration.

On the other hand, it jeopardizes the effectiveness of any A to which it applies by its comprehensive and distinct negation.

The question then, on the point relied on here, comes to this Is the *Commonwealth Customs Act*, No. 6, "a law imposi taxation," within the meaning of the *Commonwealth Consti*

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55? If it be, then everything in it which deals but the imposition of taxation is void and of no

ed upon me that, in interpreting these Acts, the to place a generous and sympathetic interpreta- n. So far as the *Constitution Act*, which is the the Commonwealth's existence, is concerned, that reasonable limits, proper and desirable. But if I ous to, and to sympathize with, the *Customs Act* nd disregarding the *Constitution Act*, I am in a e. If a man is threatened with apoplexy, which ltogether, and a dose of castor oil will save him, s him functional discomfort and inconvenience, o hesitate to administer the unpalatable dose as ay of being considerate to and sympathetic with e to save his life is much more important than to onvenience him. This enactment in sec. 55 is lculated to effect a great and far-reaching consti- e, and in any conflict between it and any Act sed in disregard of it, every reasonable interpre- ill support it should, I think, be made, however t as to any other Act, which may easily and ded or replaced.

ustoms Act then impose taxation? To me it me of its provisions do so undoubtedly if the ng and effect of their language be the criterion. nactment which has the effect of reversing the nciple of law that in interpreting a taxing act the r shall be free of the tax unless the Act clearly to him, and shall be chargeable with the lesser never it remains equivocal in the Act whether a amount is imposed on him. This rule has often in this Court, and it is very plainly stated by *Partington* v. *The Attorney-General, etc.* (c) The ting authority for insisting that where the tariff ul whether the particular goods are liable to or they shall be held liable to duty, or that when

(c) [1869] L.R. 4 E. & Ir. App. 100, at 122.

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the tariff leaves it doubtful whether the given goods are liable to a higher or to a lower duty they shall be held li the higher duty, is this sec. 138. This is in effect an enac which provides that wherever, according to the commo a man's goods would be free, they shall be taxed, an wherever, if the common law were left to operate, they be liable to a lower duty, they shall be subjected by this to a higher one. That is surely an "imposition of duty." declared in the abstract, no doubt, but it is an imposition tax *pro re nata*. It connotes that in the tariff there shal least an incomplete taxation, and it provides a reme making the taxation apply where otherwise it would not and by making equivocal liability the worst that can be the taxpayer.

Suppose a clause of a penal Act provided that, if other Act or Acts two different penalties should be applicable to any offence, the higher one should be that imposed, could it be contended that this Act did not impo penalty, although another or other Acts also imposed penalties.

Then sec. 139 seems to me to be necessarily a pr imposing a tax. The first thing which the Minister has under its provisions is to assure himself that, while the ta taxed one commodity, it has not taxed another one whi serve the same purpose as the taxed one, or any similar p and having so informed himself he may by proclamation *Gazette* direct that such theretofore untaxed commodity s charged with the duty chargeable on the commodity ta the tariff, and it shall be charged accordingly. Assumi some fraudulent substitution of a commodity, whic practically the same as the commodity taxed by the tariff be provided against without the provision amounting "imposition of taxation" this section goes far beyond tha tariff imposes, for instance, a duty on sugar. From coa form of saccharine is now extracted which is of intense ness. This saccharine may be, and is in fact, used as a sub for sugar for many purposes, though it is not sugar, a sweetening purposes it is equal to a bulk of sugar much

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than its own. Saccharine is not dutiable, so far as I can find by the tariff; but the Minister could under sec. 139 proclaim it dutiable, and this section enacts that then it is to be charged with the duty chargeable on sugar.

Again, kerosene is dutiable under the tariff as an illuminant. Radium has been recently asserted by some scientists to be as powerful an illuminant as sunlight. It is a rare mineral, and doubtless a costly one, and not immediately likely to banish existing illuminatory afflictions, but one would make much sacrifice to be rid of kerosene to begin with if one could substitute something as clean, as odourless, as uniformly effective and as comfortable as sunlight, and radium may come sooner than we think. Any way, it serves to immediately illustrate the position, if nothing else. The Legislature never dreamt of such an illuminant, and the tariff does not refer to any such in any way, but if it were introduced to Australia the Minister could proclaim it dutiable as a substitute for kerosene.

Similarly, carbide of calcium, which by the mere addition of water produces a valuable illuminating gas, could be subjected to the tax on kerosene, though the tariff leaves it, I believe, free.

And in the rapid progress of science commodities of which the Legislature never heard, or thought of taxing, may be applied to similar purposes to those to which certain dutiable goods are now applied, and the provisions of this section, and those provisions only, will make them taxable. It may be very desirable, of course, that this should be so, to prevent the sources of public revenue being made unproductive; but the point is that many goods not dutiable at all as yet may be made dutiable by the force of sec. 139, and by no other existing law, and therefore it cannot be said that sec. 139 is not a law which imposes taxation. Sec. 139 is not at all a new legislative expedient to make Customs duties effective and continuously revenue producing, but generally in other Acts, in America at all events, its analogue has required some substantial resemblance of the commodity which is not taxed by the tariff to that one which is, as well as the fact that the former serves a similar purpose to the latter; but in this section nothing of that sort is provided, but

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it enacts that wherever in the opinion of the Minister any go are a substitute for, or are intended to be or can be used as s substitute, or for any purpose for which dutiable goods can used, or for any similar purpose, the Minister may proclaim th dutiable to the same duty as is attached by the tariff to goods which they are said to be a substitute for, or wh purpose they may serve. This is surely imposing a tax on th goods.

Sec. 140 also gives to the Minister a right to charge duty any part of a commodity when the tariff has made only whole dutiable.

Of sec. 141 I am not very sure, but I think it too d impose a tax, if for no other reason than because in many ca its provisions would subject to duty goods which at the comm law would escape because it would be doubtful that the ta applied to them. I mean the description of the dutiable go in the tariff might be too remote to include the essence or p paration—*i.e.*, if beef were the subject of duty in the ta bovril might at common law well be held not to be "beef," sec. 141 would make it liable all the same to the duty on beef a proportion to be ascertained.

Sec. 144, too, is, I think, an imposition of taxation on same principle as is sec. 140.

Sec. 148 is a remarkable section, because it not only impo the tariff duty which is applicable to such classes of goods, goods which are "found derelict flotsam jetsam or lagan or lan saved or coming ashore from any wreck," if those goods w goods intended for Australia and the ship which brought th were wrecked; or if the goods were either fraudulently floa ashore or moored near the shore instead of bringing them i port and discharging them in the usual way, and for the purp of evading duty; but it imposes that duty on goods wash ashore from a ship which was bound for some other coun than Australia, but was wrecked on the Australian shore. the former case it might be said sec. 5 of the *Tariff Act* impo the scheduled duties on all goods "imported into Australia," a secs. 58 and 64 of the *Customs Act* evidently contemplate th importation shall mean brought to a regular port of discharge

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reported for importation, and that, therefore, sec. tends that definition of "importation." But in sec. 148 clearly imposes duties, charged by the classes of goods as are by misfortune washed h the tariff never intended that goods which were be imported into Australia should be so charged. n is authorized clearly, I think, not for the ning "imported" as used in the *Tariff Act*, but in goods which get into consumption in fact, though d in any sense. As a means of extending the erhaps, desirable, but I think it is effected by the which sec. 148 gives to impose it, and that makes imposing taxation.

s included in this section have been the subject of on, and it appears that they were never liable to Customs law which prevailed up to the year 13 when in England it was decided in *Shepherd* v. hat goods flotsam—*i.e.*, floating about as from a ot dutiable. The same was affirmed later, in 1699, *Courtney* v. *Bower* (*e*); and in 1698 by Lord Holt ous case, reported at 1 Lord Raymond 388. A sh Acts, all of which are enumerated and repealed ting Act, 9 & 10 Vict., c. 99, expressly preserved to that date; and the first time that these things le, so far as I can discover, was by sec. 76 of the 16 & 17 Vict., c. 107, which is an enactment which ntended to tax what had not theretofore been whose language distinctly did it. Sec. 148 varies of this section a little, but it must be taken, I Australia what that section had done in England— on a class of goods which otherwise would have any.

Tariff Act, sec. 5, provides that the duties which all be on "all dutiable goods under the schedule Australia," etc. This means, I think, brought t to which the vessel or other vehicle containing ned and duly reported and discharged there, and

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(*e*) 1 Lord Raymond 501.

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that seems to have been the view taken in *Attorney-General Ansted* (*f*), and indeed it was so defined in the Act 3 & William IV., c. 52, sec. 125, therein referred to. Then, if excludes mere fraudulent devices to evade that definition, 148 of the *Customs Act* is a very comprehensive extension sec. 5 of the *Tariff Act*, and makes duty payable on go which never were "imported" within the meaning of the *Ta Act*, sec. 5, "as if imported in the ordinary course." T language admits that those goods will not have been "importe as the *Tariff Act* intends, but shall be treated "as if impor in the ordinary way." This is clearly in my opinion a disti and independent imposition of taxation on such goods as 148 covers.

These several sections are nearly all well known in *Custo Acts*, though some of them are made more sweeping than in other Act of which I have knowledge. Their purpose is prevent evasion by fraud, ingenuity, or good luck, and to ens that the Customs estimate of revenue shall not be made dwindle by these causes. Still they are enactments impos duties on subject-matters not at the moment known, but to afterwards ascertained.

Having then concluded that all the sections examined, at events, appear, so far as their language is concerned, to statutory impositions of taxation, I have now to deal w certain arguments submitted for the complainant. It was c tended that these sections were really interpretation sections give greater amplitude to the meaning of the provisions of *Tariff Act*. They do not, however, affect to be such, and i plain that, though some of the operations of some of th *Customs Act* sections might be not inconsistent with that vi their operation for the most part is not to extend the mean of the *Tariff Act* provisions themselves, but to enable Minister, on the ascertainment of certain conditions, to m goods dutiable which are not so dutiable under the tariff; in other cases to impose duties in respect of goods not touc by the tariff at all, and which are in some cases inconsist with the tariff provisions.

(*f*) [1844] 12 M. & W. 520.

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vas contended that the *Customs Act* was an enact-
conditional on a Tariff Act being passed, and that for
testing it, in view of sec. 55 of the *Constitution Act*,
rd its effect on the very day it passed, and that if
not to then within the meaning of sec. 55 impose
id not fall within the operation of sec. 55 at all,
hink, a proper view. Sec. 130 of the *Customs Act*
VIII. of that Act from applying to any duties
any State Act, and therefore, failing a Common-
Act, authorizing the levying duties of Customs,
ubject-matter upon which, or in relation to which,
of the *Customs Act* which are in question could
operated in the full sense. The usual practice,
"protecting the Commonwealth revenue" by
ariff Bill as if it were an Act, under the authority
of the House of Representatives, was resorted to
d duties were collected on the basis of the bill,
ustment to be made afterwards between the tax-
e Crown upon the basis of the tariff as actually
result, therefore, was that these sections of the
ow under criticism were "dormant," as Hodges,
them in *Stephens* v. *Abrahams* (*g*), as to legal
ling the passing of the *Tariff Act*; though under a
evailing and accepted, though illegal practice, they
fact administered on the assumption that the
esently be enacted. But, however this may be,
the *Customs Act* was legislation operative con-
he *Tariff Act* passing; that latter Act was in effect
t, and, if it had not passed, then that Part VIII.
ave awakened, it would have continued "dormant."
when it passed was this, that it imposed taxation,
onditions should happen to which its provisions
le, and provided the *Tariff Act* passed. The
pass, on the 16th September 1902, and sec. 4 of
ted that it should be deemed to have come into
he 8th October 1901. The *Customs Act* came into
3rd October 1901, and sec. 2 of the *Tariff Act*

(*g*) [1902] 27 V.L.R. 753.

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provided that the *Customs Act* should be incorporated and r as one with it. The alleged offence here occurred on 2 November 1901, and the prosecution was instituted 12th A 1902. It was quite within the authority of the Commonwe Parliament to enact conditional legislation, and it did enact *Customs Act*, which provided that certain taxation should or might be, imposed if the *Tariff Act* were passed. That was subsequently passed, and the language, which warra the imposition of taxation, thenceforth in fact enforced it. S conditional legislation is common, whereby Parliament autho certain things to be done if some designated person, or b does some act—*e.g.*, Acts authorizing the extension of G Preservation Acts, or Vermin Extermination Acts, or the ap cation of parts of some other Act to a special district or are and all such legislation is valid, and in my opinion shoul interpreted to be an Act to do whatever may be done under authority. See *Reg.* v. *Burah* (*h*); *Powell* v. *The Apollo Ca Co.* (*i*). These were cases, it is true, in which an Act author something to be done if a designated person saw fit u certain prescribed conditions to do it, but I do not think th makes any material difference if, as here, the Legislature pa one Act which is to have effect if it itself shall pass another.

Counsel pressed *Powell* v. *The Apollo Candle Co.* (*sup* as deciding that the taxation with which that case was dea was imposed by the Governor in Council, and not by the though it was done under the authority of the Act. I not think that the Lords of the Privy Council meant to d that distinction. It was in that case contended that the Pa ment of New South Wales had delegated to the Governo Council the power which the *Constitution Act* of New So Wales had conferred on it, to impose taxation; and that, as Parliament was itself but the delegate of the Imperial Pa ment, it could not lawfully thus delegate its powers. The Pr Council held that the New South Wales Parliament was not position of a delegate, but enjoyed absolute and original pow within limits prescribed by the *Constitution Act*. By a cla resembling sec. 139 of the *Customs Act* here under discuss

(*h*) [1878] 3 App. Cas. 889. (*i*) [1885] 10 App. Cas. 282.

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the Legislature of New South Wales had enacted that in certain circumstances the Governor in Council might declare goods to be dutiable which were not so under the tariff. The Governor in Council had, purporting to act under this power, declared stearine to be dutiable. The Privy Council held (p. 291) that the Governor in Council did not do this as an exercise of legislative authority, but only as a determination made under the authority of the Act of Parliament. I understand this to mean that the Act had in effect declared in advance "Whatever duty you the Governor in Council authorize, in the conditions which this Act requires, that duty is affirmed and authorized by this Act." That, in my opinion, is an imposition of a duty in advance, whose subject-matter shall be afterwards ascertained by the Governor in Council, but so as to accord with a definition already prescribed by the Act itself.

That decision then is an authority for the view that sec. 139, and indeed the others also, do impose duties, though those duties are to be ascertained afterwards by reference to the statutory conditions. It is also an authority as I have said for the proposition that legislation imposing taxation may be conditional.

A grant subject to a condition to happen *in futuro* is none the less a grant, though it may be defeated by the non-performance or non-occurrence of the condition; and so of a devise. Besides, a conditional imposition of taxation is just as effectual taxation, once the condition is accomplished, as any immediate and absolute taxation.

The words "imposing taxation" in sec. 55 must, I think, be read as "for the purpose of imposing"—*i.e.*, whose object is to impose a tax, whether at the moment, or in the future, or conditionally in the future. The primary purpose of the section is to enable the House of Representatives to insist on its right that the Senate shall not amend a proposed law imposing taxation, but at the same time it insists that the House of Representatives shall send up any such proposed law severed from anything else, and that no attempt to the contrary can be of any avail. Then if any proposed law, whose purpose is to impose taxation, be sent to the Senate, that House must not touch it in the way of amendment, whether its

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proposed operation be immediate or deferred, absolut conditional. If then this *Customs Act* be judged, as it is sa the test, as on the day it passed, the sections of Part VIII. w are being discussed were assuredly laws for the purpos imposing taxation, which is what I think sec. 55 must mea find it difficult to believe that if these sections of the *Cus Act*, now under discussion, were sent up by any Lower Hou any Upper House in Australia, alone, without the provisions of the *Customs Act*, as a proposed law, any Parlia tarian would affirm, or contend, that they constituted a me which it would be open to the Upper House to amend, a amounting to a money bill; though I am not unaware that critics have been known to display fortitude, and even d in the latitude which they have claimed on such questio occasion urged them.

The sections in question then are, as I think in the na effect of their language, legislation imposing taxation; operation was made subject to a condition which was perfo and therefore they embodied, at the date of the offence, a the prosecution, in my opinion, in the fullest sense a imposing taxation within the meaning of sec. 55, and *a fo* because the *Tariff Act* was not only passed, but by its provided that it was to be deemed to have come into oper as on the 8th October 1901—*i.e.*, the same day as the *Cu Act* did.

It is further fair to infer that when the *Customs Ac* Parliament, having been passed 3rd October 1901, the legis intention was that the *Tariff Act* was meant to be compleme to it, and if it had been possible practically to pass the latte at once, the two Acts would have been passed together, and sections of Part VIII. of the *Customs Act* would have ha same effect, though in a separate Act, which they have incorporated as they are with the *Tariff Act*. Read with it certainly are taxing sections, because there is nothing else i *Tariff Act* to impose the duties which they impose. If th so, then their meaning and effect as they occur in the *Cu Act* must always, of course, have been the same, and ther they are legislation imposing taxation within the meani

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sec. 55 of the *Constitution Act*. Hence, whether one tests these sections by regarding them as they stood on the day of their passing in Parliament, or by the light of the conditions which subsequently happened, the result is the same. The consequence is that all portions of the *Customs Act*, except such as do impose taxation, and whether they are regarded as a separate enactment or as incorporated with the *Tariff Act* by its sec. 2, are of no effect and are void. Therefore sec. 234, under which this prosecution was instituted, is void. It is not a section which deals with the imposition of a tax only. It is a section intended to deter people from seeking to evade or cheat the customs duties, or to prevent or embarrass their due collection.

So also is sec. 236 void. Sec. 255 is also void, and this case was conducted on the strength of it. So is sec. 183. The result is that the foundation of the information and of its prosecution fails, and the conviction is bad.

It was finally contended for the complainant that if the defendant succeeded in cutting away the ground of the prosecution, he must cut away his right of appeal also, and so could not upset the conviction, because it was said that sec. 248 of the *Customs Act*, which gives a right of appeal, falls also in the common destruction. It is very true that where a right of appeal does not arise necessarily in the ordinary course, there can be no appeal, unless one is expressly given. The appeal which is allowed by sec. 248 is a right which is given as an incident to certain new rights and obligations by Commonwealth legislation, and which certainly could not be given, as such, by any State legislation, and under ordinary circumstances the rule would apply which is laid down in *Atkinson* v. *The Newcastle, etc., Waterworks Co.* (*k*), and which is recognized in (amongst many other decisions) *Osborne* v. *Barclay* (*l*) and *Sandback Charity, etc.* v. *North Staffordshire Rly. Co.* (*m*) that where an Act of Parliament creates a new right and also provides a particular remedy, no other remedy can be made available; and so if sec. 248 fails, the only appeal which was possible, as such, fails too.

(*k*) [1877] 2 Exch. D. 441. (*l*) [1901] A.C. 278.
(*m*) [1877] 3 Q.B.D. 1.

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It was also maintained by counsel that, if the procedu prescribed by the *Customs Act* failed, still the *Commonweal Punishment of Offences Act* 1901 would have to be considere but as that Act, as I understand him, by sec. 3 gives jurisdicti to try offenders against the "laws" of the Commonwealth; the if the offences created by the *Customs Act* have no validity, th are not "laws" of the Commonwealth, and so neither the jur diction to try under sec. 3, nor the appeal given by sec. 4, c apply, and therefore the defendant here has no remedy, becau he has no right of appeal under either of the Acts.

I think that this *Punishment of Offences Act* 1901 may laid out of the question altogether. It was obviously enacted provide for the trial of other offences than those involved Customs prosecutions. Part XIV. of the *Customs Act* provid for the procedure in Customs prosecutions expressly and e clusively; and the same rule which was invoked as to ne rights and new remedies would ordinarily apply here, whe there was any jurisdiction to resort to that procedure. In su a case, no matter how erroneously the prescribed Court acte no other means of remedying the error could be resorted to th that allowed by the Act which created the new right, and if provided none, then there could be none, and the error wou have to be endured. The defendant's contention here is that t State court of petty sessions had no jurisdiction to hear a determine this complaint, because it was founded on legislati which was a nullity; and he says that one way or other he entitled to quash the conviction had upon that complaint.

Sec. 245 of the *Customs Act* affects to give jurisdiction (the circumstances existing in this case) to any State court summary jurisdiction, which the Court of Petty Sessions at Me bourne is, to hear and determine Commonwealth Customs pros cutions, *i.e.*, to give to an existing State Court, Commonweal jurisdiction, in Customs prosecutions. Then sec. 248 gives, respect of this Commonwealth litigation, the like appeal in t like manner as prevails under the law of the particular State i respect of convictions or orders of dismissal in State prosecution In Victoria that manner of appeal is by order *nisi* to review th decision of the court of petty sessions under sec. 141 of th

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Justices Act 1890, and that is the form of appeal which has been adopted here.

By that section (141) of that Act the Supreme Court is given jurisdiction "where any person who feels aggrieved by the summary conviction etc. of any court of petty sessions etc. shows by affidavit to a Judge of the Supreme Court etc. that such Court etc. had no jurisdiction or authority to convict etc. or that the conviction etc. ought not in law to have been made," etc., he may apply to the Supreme Court or a judge thereof for an order *nisi* to review such conviction, etc.

Then sec. 146 of the same Act provides that "on the return of such order *nisi* to review the 'Full Court' (which has been held to be an error for 'Supreme Court') may . . . . confirm vary amend rescind set aside or quash such conviction etc. or may prohibit the said Court and the members and officers thereof etc. from proceeding or further proceeding in respect of the said conviction etc. and may also for such purposes or any of them and without prejudice to the generality of the powers hereinbefore conferred exercise all or any of the powers or jurisdiction which it possesses or might exercise upon *certiorari mandamus* prohibition or *habeas corpus* etc."

Now, since sec. 55 of the *Constitution Act* necessarily imposes the duty of deciding on the validity of portions of Acts of Parliament which involve the imposition of taxation, it must intend that some Court shall, in all circumstances, be available to so decide, and it may be that sections providing for such a tribunal in such an Act as the *Customs Act*, for example, might survive, though all other sections, except those imposing taxation, should fail. And if the primary Court's jurisdiction to do this one thing survived, so for the like reason would the appeal given by the same Act. It must be observed that no Court of the Commonwealth, if any were existing, could relieve the defendant from a wholly illegal conviction, as this is, if my view be right, any more than the State Supreme Court can, if the present point be right. If, then, these secs. 245 and 248 do survive for the mere purpose of making sec. 55 of the *Constitution Act* effectual at all, though for nothing else, as to which I

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have very grave doubt, then the present is the proper proces appeal, and this Court's duty is to hold that, as the Cour Petty Sessions ought to have decided that there was no v law on which to found this charge against the defendant, t should not have been any conviction, and the order *nis* review should be absolute and the conviction quashed.

But if secs. 245 and 248 are nullities like the rest, ha regard to my opinion, then the position is this—a Victo subject has been charged in a Victorian Court, by an office the Commonwealth, with having offended against an all Commonwealth law which never existed, and on the assump that the Victorian Court had jurisdiction to try this Comm wealth business, which it never in fact legally had, thereupon the Victorian Court has convicted the defendant. could not be disputed that in those circumstances this C could stay the whole proceeding by a common law wri prohibition, as for a total want of jurisdiction.

But sec. 146 of the Victorian *Justices Act* 1890 expre provides that the Supreme Court may on the return of an o *nisi* to review quash any order for want of jurisdiction, o the ground that in law it ought not to have been made, and prohibit any proceeding under it, and may for this purpose any of the powers which it possesses or might exercise und writ of prohibition.

Therefore it can do in this proceeding what it could done by prohibition, and so in this view also this order should be made absolute. Order *nisi* absolute with costs t taxed. Conviction quashed, and all proceedings under it t stayed.

Order absolute

Solicitor for the informant: *Guinness*, Crown Solicitor.
Solicitor for the defendant: *Gillott, Bates & Moir*.

J. M.

(See next case.—ED.)

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May 11, 12, 13, 14.

Australia Constitution Act, 63 & 64 *Vict.*, *c.* 12, *ss.* 53, 54, 55—*ng taxation*"—"*Other matter*"—*Commonwealth Customs Act II.*, *No.* 6), *Part VIII.—Ib.*, *ss.* 183, 234, 236, 245, 255—*ommonwealth Customs Tariff Act* 1902, 2 *Ed. VII.*, *No.* 14, *ct of incorporation in of Customs Act—False entry—Penalty—v.*

the *Commonwealth Customs Act* 1901 is not a "law imposing he meaning of sec. 55 of the Constitution.

" in sec. 55 means matter foreign to the imposition of taxation. , even if Part VIII. of the *Customs Act* were a "law imposing isions of secs. 234, 236, 245, or any of them, are "other matter" of sec. 55.

The expression "law imposing taxation" is a special phrase ular constitutional class of law, and is not to be read so as to ery section which increases the orbit of taxation.

ahams (*supra*, p. 201) overruled.

pollo Co. ([1885] 10 App. Cas. 282) distinguished.

REVIEW referred to the Full Court.

ant, Leah Abrahams, was charged on information 4 and 236 of the *Commonwealth Customs Act*, No. 6, before the Court of Petty Sessions at that "she on the at Melbourne was ncerned in making in a certain declaration etc. untrue" in certain particulars. The offence he information were similar to the offence and ealt with in the case of *Stephens* v. *Abrahams* *a*, p. 201).

ant was convicted, and fined 25*l.*, with costs. This eview this decision was obtained on six grounds. 5), and (6), which are the only grounds dealt with t herein, were identical with grounds (4), (5), and of *Stephens* v. *Abrahams* (*supra*).

urn of the order *nisi*, Hood, J., by consent of the d it to the Full Court.

ttorney-General for the Commonwealth of Aus- *ussen* (with them *Miller*) for the informant to The 4th, 5th, and 6th grounds of this order *nisi*

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are the same as last three grounds in the case of *Stephen Abrahams* (*ante*, p. 201). The question here, as there, p tically resolves itself into the question whether the *Customs* is a law imposing taxation within the meaning of the word sec. 55 of the *Constitution Act*, or rather whether there ar be found in the *Customs Act* any provisions which, either at time it was passed or now, impose taxation within the mea of sec. 55. It was contended before the Chief Justice that words "laws imposing taxation" in sec. 55 have no special stitutional significance, but merely convey "the act of mal forthwith subject to taxation" as they would do in any o enactment; that the words are not intended to be generic descriptive of a constitutional class of laws. The contentio the informant is that they have a special constitituti significance. After referring at the outset of his judgmen this contention as having been specifically put before him, remarkable that the Chief Justice never again refers to it appears to have from the outset adopted the view that the w are used in their ordinary literal sense. His judgment thro out deals with them in that aspect and in that aspect The contention which was put before the Chief Justice, which is put here is that the words have a special "Parlia tary" sense; that they denote a certain well-known clas laws which, besides the actual imposing of taxation in narrowest sense, include certain provisions connected therew that these common and necessary provisions, as well as "imposing" in its narrow sense, are included in the term imposing taxation." When the section speaks of "any matter," it means matter foreign to the imposition of taxa and foreign to that which is ordinarily by long Parlimamen usage permitted to be included in an Act which does, wit any doubt, impose taxation. A law which in the sense imposes taxation, or imposes the obtaining of m from the public in a particular way and for a partic purpose, is not a "law imposing taxation" in the stitutional sense, even if it does obtain money from the pu As to the interpretation of words not in their ordi meaning, but as known to the Constitution or to

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see *Commissioner of Income Tax* v. *Pensell* (*a*). The Chief Justice's conclusions are summarized towards the end of his judgment, where he says:—"The sections in question then are, as I think, in the natural effect of their language, legislation imposing taxation. . . . . The result is that the foundation of the information and of its prosecution fails, and the conviction is bad" (*ante*, pp. 224, 225). The language of that passage, taken with the rest of the judgment, shows that the learned Judge held that the words are to be read in their *primâ facie* or superficial meaning, and as if they had never occurred in an Act of Parliament before. It is submitted that none of the sections he refers to imposed taxation in the true sense of these words, whether they are regarded as incorporated with the *Tariff Act* or not, and whether they are regarded at the time the *Customs Act* itself passed, or after the passing of the *Tariff Act*. The judgment practically admits that at the time it passed the *Customs Act* did not impose taxation, except, as it is termed, "conditionally." Practically he holds that a law of this description, though it makes no levy on the public, is still a law imposing taxation if there is a possibility of its becoming a law imposing taxation or collecting money, and hence that the occurrence of such a provision in either of these Acts would render the residue void. The mere fact that a law brings about the payment of money by the subject does not make it a "law imposing taxation" in the constitutional sense, however the man in the street might regard it. In this case it is further submitted that the payment is not made under this Act at all.

[WILLIAMS, J. As I understand it, the contention of the other side will be that even if this Act did not impose taxation on the day on which it was passed, still at the time the alleged offence was committed it was an Act imposing taxation.]

Counsel for the defendant before the Chief Justice relied on *Powell* v. *The Apollo Co.* There the Legislature deputed to someone else the task of taxing. Roughly speaking, what the Privy Council there decided was that these Acts authorizing

(*a*) [1891] A.C. 531.

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the tax practically imposed it. In the present case there wa
such deputing to another person—the Commonwealth Pa
ment itself, in a later Act, which was absolutely under
control, imposed the taxation. The Parliament retained i
own hands, even after passing the *Customs Act*, abso
freedom, which it could exercise when it came to pass the *T*
Act. The group of secs. 53, 54, and 55 of the Constitution is re
not original—they each have a history. Sec. 53 is a trans
of practices that have existed for a couple of centuries in
mother country, and the same is true of secs. 54 and 55—
represent what in England is the result of convention:
May's Parliamentary Practice (10th ed.), p. 542; *Quick*
Garran, p. 674. According to Professor Moore (*Commonw*
of Australia, p. 121), "the last clause in sec. 53 has a poli
rather than a legal significance," etc. The arrangem
embodied in sec. 53 are—"proposed laws appropriating mone
imposing taxation" shall not originate in the Senate—th
followed by words which restrict the meaning of the w
"laws appropriating revenue or imposing taxation"—the
provision that the Senate shall not amend proposed
imposing taxation or any proposed law so as to increase a prop
charge, etc. But that is modified by the provision as to req
(commonly called "suggestions"), which is taken from S
Australia. That section then is clearly an endeavour to st
type into the Constitution the practice between the two H
in the mother country, with the addition in favour of the S
of the South Australian practice with regard to "suggesti
The question of powers of the Houses here is altogether dis
from the question of the powers of the Commonwealt
against the States; as far as the duties are concerned it is,
speak, a domestic question—it is no question of their rig
tax, for instance; it is merely a question of the powers o
two Houses within the Commonwealth itself. All that is
with in these three sections is the manner in which bills a
be dealt with between the two Houses. There being
powers in the two Houses in regard to all matters (other
those specifically excepted), there could be no special prov
in regard to the procedure to be observed as between the

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Houses in ordinary measures. Those questions of procedure cannot arise in regard to those matters in which the Senate has just as much power as the House of Representatives. They can only arise where that equality is disturbed, and that equality is disturbed only in one class of measures—the class which the Chief Justice speaks of as money bills. The relations of the two Houses here differ from those of the Lords and Commons in England, chiefly because the Commons have long claimed, though the doctrine is not yet admitted, that as regards money bills (including laws imposing taxation) the Lords have not the right even to reject them. The rights of the Senate cannot be affected by any such claim here, for the Constitution preserves to it the right of rejection. In that respect the Senate occupies the same position as the Senate of the United States. The question then, as between the two Houses here, is much less important than it is in England. Accordingly, this restriction in sec. 55, even as a matter of procedure, has no significance in the Commonwealth Constitution, except so far as it diminishes the right to amend. The net effect of sec. 53 is to give the Senate more power, even in connection with laws imposing taxation, than is given to corresponding bodies anywhere else, except in the United States. Reading sec. 55 in the light of the history and intention of sec. 53, the former is seen to be absolutely a matter of procedure. There can scarcely be any question of substance to which it can apply. The contention that sec. 55 is procedural merely may be illustrated by the Act questioned here. Even according to the judgment of the Chief Justice, there is nothing in Part VIII. of the *Customs Act* which makes it of no effect. There is nothing in the other parts of the Act viewed apart from Part VIII. that makes it of no effect. It is simply the fact that Part VIII. is tacked on to the other nine or ten parts of the Act that, according to the Chief Justice, makes the greater part of the Act bad. The questions under sec. 55 must therefore always be merely questions of procedure. Its object is not to protect the State, or the taxpayer, or the Commonwealth.

[WILLIAMS, J. Its obvious purpose is to protect the Senate.]

It is a peculiar feature of this case that it was the House of

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Representatives that neglected to stand on its privileges h
That House sent the Customs Bill up, not as a bill impo
taxation, but as an ordinary measure. The Senate d
with the measure, and amended these clauses which
now said to be provisions imposing taxation, so that if ei
body had the right to complain, it was the House
Representatives. It will then be said that even if that b
then both Houses neglected their duties under the sections;
the House of Representatives ought to have been more st
the Senate should have restricted themselves to asking that
measure be sent up in two parts—that the community is enti
to be protected against any improper or unconstitutional ag
ment or bargain between the two Houses, or against one b
intimidated or cajoled by the other. But that argumen
untenable, for if the Senate will pass the measure in one
whether from intimidation or cajolery or any other motiv
will pass it if it is sent up as two bills. What is the misc
these three sections are intended to cure? The Chief Jus
we submit, gives the true answer when he says:—"It
matter of well-known history . . . . approve" (a
p. 212). His Honor there intimates that the mischief to
cured is the practice of "tacks," and he describes what is me
by a "tack." One of the simplest cases of a "tack" would
the introduction of an Income Tax Bill tacked on to the Ann
Appropriation Bill. *Burinot's Parliamentary Procedure*,
474 and 570 *et seq.*, gives the English and Canadian experie
in tacking. In Victoria there have been only three c
of any importance. In 1865 there was the tacking of
whole of the new tariff to the Appropriation Bill.
1886–7 the proposed grant to Sir Charles Darling
included in the Annual Appropriation Bill. In 1877
third great instance of tacking occurred, when the prop
for payment of members was introduced in the Appropriat
Bill to ensure its passing. As to the practice in Engla
vide Todd (Spencer Walpole's edition), vol. ii., p. 226
"In proceedings in a parliament upon matters of supply
taxation the two Houses do not stand on the same footing, e
At p. 227 the friction between the two Houses with referenc

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the paper duties is described. That was a proposal not to impose but to remove a tax. The Lords rejected it; the Commons then passed their celebrated resolutions as to their right in granting aids and supplies, and they included them in their Appropriation Bill when it was passed. Great exception was taken to this course, but it has become since then almost an accepted practice that the Commons may include a series of taxing measures embodying the taxing proposals of the year in one measure. That is prevented under the Commonwealth Constitution by sec. 55. What "tacking" is can best be seen by looking at the cases where it has actually occurred. If those cases are examined it will be found that they are altogether different in their nature to the case of including in the *Customs Act* these sections which are being criticised to-day. "Tacking" (the mischief aimed at) has consisted invariably in the attempt to pass some foreign and usually very important measure by including it in some measure with regard to which the will of the people is believed to lie in a particular direction; and in the one legislative body seeking to take advantage of that to put the other in the position that it must either reject something which the people desire, or, if it accepts it, must accept also some other measure to which it has objections, and which it would reject if sent up as a separate measure. That is "tacking" as it is known in history—that is what the Chief Justice says these clauses are meant to prevent. But that "tacking" is an utterly different thing to what is criticised in the *Customs Act*—namely, the insertion of particular sections of an administrative character. Moreover, on the Chief Justice's reading, if an unpopular tax is "tacked" on to a popular measure the effect will be to kill the popular and leave untouched and valid the unpopular measure. If, on the other hand, the tax is popular, it is ridiculous to speak of it being tacked on to another measure. That also shows that sec. 55 is merely procedural, and if that be so it will not be so severely interpreted as if it dealt with matters of substance affecting the rights of taxpayers.

[A'BECKETT, J. I think it is a question of interpretation. The section may, as you contend, have been introduced for

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purposes of procedure, but in order to accomplish those purp
there is an enactment of a very positive kind. Whether it
matter of procedure or of substance can make no difference a
its interpretation. You have still to say what the words m
Supposing that by an accident a section gets in which
doubtedly imposes a tax, I should say that, however it
there, and recognizing to the full the reasons which led
Legislature to pass sec. 55, the inclusion of that section impo
a tax would make everything else in the Act of no ef
What is the other interpretation you suggest ?]

It is submitted that "laws imposing taxation" are
customary laws used in the imposition of taxation in G
Britain and these States. You cannot have laws of that
wandering about accidentally in another Act; that is a t
which cannot very well happen. They are a generic clas
constitutional law.

[A'BECKETT, J. I understand you to mean that if a mea
is not within the constitutional prohibition in the Senate in
53, it is not a "law imposing taxation" within sec. 55.]

That puts it shortly. The "law imposing taxation" in se
is a law which was a proposed law imposing taxation wi
sec. 53. It is a well-established principle both in the Un
States and Canada that the Courts will, as far as poss
assume the validity or constitutionality of an Act passed
the Legislature created by the Constitution. That prin
has been indorsed by the Privy Council in respect of
passed by a Legislature subordinate to the Privy Cou
Cooley on Constitutional Limitations (6th ed.), p. 218. "W
the Constitution and a statute are in conflict it is the dut
the Court to construe the statute according to the intenti
the Legislature."

[WILLIAMS, J. I am of opinion that these challenged sec
are merely machinery or interpretation clauses.

A'BECKETT, J. The principle referred to, I should th
applied only to the case where the words used are doubtfu
to their effect.]

We submit that the challenged sections are capable of b
read merely as interpretation sections: *Clarke on the*

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tralian Constitution, p. 33; *Valin* v. *Langlois* (*b*); *Queen* v. *Wason* (*c*); *Kingston* v. *Gadd* (*d*). Apart from that, the words "laws imposing taxation" must necessarily mean and include in their natural meaning any provision necessary for the complete collection of the tax. The words "imposing" or "imposition" occur also in secs. 53, 88, 89, 90, 91, 92, 95, 112, 114, and 121, which all bear out this view.

[*Isaacs, K.C.*—Sec. 95 expressly distinguishes the "imposition" from the "collection" of duties with regard to Western Australia.]

That is so, and the reason is clearly that but for such express distinction "imposition" would have been taken to include, as it does elsewhere in the Act, "collection." The word law in sec. 55 means "an enactment which at the stage that it was a proposed law could not have originated in or been amended by the Senate." A "law imposing taxation" in sec. 55 means "any enactment whereby taxation is imposed on a certain named subject-matter, either unconditionally or on a condition the fulfilment or non-fulfilment of which is not within the control of Parliament." In the present case the *Customs Act* does not impose the duty. It remains practically a dead letter unless the Parliament which passed it does something to impose a tax. Take the "substitution" section in the *Customs Act*. That is no imposition of a duty until Parliament decides what is to be dutiable. When Parliament does make an article dutiable it does so with the knowledge that in doing so it is making any substitute dutiable. The *Constitution Act* is really an English Act, and in using the words "laws imposing taxation" the Imperial Parliament must have had in view the numberless cases of "laws imposing taxation" on the English Statute Book. For more than a century in England every new Act imposing a tax has included all the machinery to collect or otherwise connected with it. Take the Statute of 1901, 64 Vict., c. 7, which imposes a new tax on coal. It not only includes that tax, but also contains in an appendix the provisions as to the exportation of coal, modifications of the *Customs Act*, the new tax, and a new

(*b*) [1879] 5 App. Cas. 115. (*c*) 170 A.R. (Canada) 221.
(*d*) [1901] 27 V.L.R. 417.

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procedure. The Australian Parliament could not includ those matters, because it can only put one tax in one bil it can include everything which is not foreign to the tax the United States the only matter in which their Con tion makes any distinction whatever is that all bills raising revenue shall originate in the House of Repr atives. Yet those words, "all bills for raising reve from the beginning of the Union till the present have been taken to include bills for spending the mon raised. The result is that there the House of Represent has taken upon itself the sole power of introducing ordinary appropriation for the year: *Vide Story o Constitution*, p. 642. That is going a great deal fu than it is necessary to go here. Then the Chief Justice that it is impossible to believe that if these sectio the *Customs Act* were sent up by any Lower Hou any Upper House in Australia alone, and without the provisions of the *Customs Act*, it could be contende any Parliamentarian that they constituted a measure wh would be open to the Upper House to amend as not amou to a money bill. The answer to that is found in what act occurred in the Commonwealth Parliament. The Englis American practice with regard to bills imposing taxati similar—where a particular tax is imposed the pr allows the inclusion of anything necessary for the con imposition of that tax as long as it relates to that tax The result is that both English and American Statut clude many measures which might be questioned as irre under the Chief Justice's judgment, and the same ma said of colonial legislation. He puts the principle as "on one bill"—that is accurate enough if understood that w that bill anything necessary to the imposition and collecti the particular tax may be included. His judgment, how practically substitutes for sec. 55 a section which would r "Every law which in itself or in connection with anothe directly or indirectly affects the incidence the amount o time place or mode of payment of any tax or which is ca of having such effect with respect to any tax which at any

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hereafter may be imposed shall deal only with such matters and any other provisions therein whatever whether necessary for the ascertainment or enforcement of the tax or not shall be of no effect or shall cease to have effect upon the passing of such other law." The effects of such an interpretation would be incalculable. It would render it impossible for the Commonwealth Parliament to legislate by general Acts for general purposes, and to leave it to later Acts to provide the money, though that has been the practice in England for centuries. It would mean the shackling of the Legislature to an unheard of extent and to no practical advantage. In the present case, as was said by Hodges, J., in *Stephens* v. *Abrahams* (*e*), Part VIII. of the *Customs Act* was "dormant" prior to the passing of the *Tariff Act*, when the latter, by virtue of sec. 2, wakens it into life, and is to be read as if every section in the *Customs Act* were set out in it: *Hardcastle*, p. 230; *Canada Southern Rly. Co.* v. *International Bridge Co.* (*f*). If, therefore, the clauses of Part VIII. do impose taxation, they do so by virtue of the *Tariff Act* and not of the *Customs Act*. It is still open to Parliament in passing the *Tariff Act* to restrict or modify or destroy the application of any of the general provisions in the *Customs Act*; as a matter of fact it does so in some cases. For instance, it excepts opium from the operation of sec. 138. (See item 106 of the schedule.) A reference to the debates in the Convention will show the way in which sec. 55 was regarded by members: *Quick and Garran*, pp. 675–678.

[WILLIAMS, J. That may be very interesting, but we cannot take it into consideration.]

As a matter of Parliamentary practice (*May*, 10th ed., 542) measures of new taxation are always dealt with separately, though they may include the remotest machinery for the commencement and administration of the tax. Sec. 55 says in effect "No tacking to tax bills." *Queen* v. *Burah* (*g*), *Hodge* v. *The Queen* (*h*), and *Powell* v. *Apollo Co.* (*i*) are all distinguishable as cases in which the power has passed out of the hands of the

(*e*) [1902] 27 V.L.R. 753.
(*f*) [1883] 8 App. Cas. 723, at p. 727.
(*g*) [1878] 3 App. Cas. 889.
(*h*) [1883] 9 App. Cas. 117.
(*i*) 10 App. Cas. 282.

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Legislature into the hands of somebody else. This is a cas which political and legal issues mingle, and the presumptio favour of the validity of the law is particularly strong: *Moore on the Australian Commonwealth*, pp. 133 and What is necessary for the imposition of taxation? (*a*) there must be a rate or amount, which is in every case fixe the Legislature. (*b*) There must be the person who has to In the case of a poll tax these two are all that is neces Where the tax is on property you require (*c*) the subject-ma Included in these is the manner of paying the tax, the ti paying it, the currency in which it is to be paid, the enforce of it, and the person to whom it is to be paid. The enforce would include a procedure for settling disputes, for the rec of debt, and penalties if necessary to enforce the recovery. Legislature may either name the subject-matter or it may the means of ascertaining it. It is submitted that the S would even have power to originate an Act providing a subject-matter, together with a schedule, and to say " Customs duties are imposed this shall be the schedule." T a much stronger case than the present, for that would act ascertain the subject-matter, whereas all that is provided these challenged sections is the means of ascertaining subject-matter. Until the rate or amount and the perso subject-matter are either ascertained by a taxing Act, ascertainable by means outside of Parliament, there is n ation. The argument which was most strongly pressed other side before the Chief Justice was that but for challenged sections goods which are now dutiable would dutiable, and therefore that those sections were sections imposed taxation. It could be with equal force contende sec. 22 of the *Acts Interpretation Act*, which gives the me of "land," would be a section imposing taxation, becau means of it property would, in the event of a land tax, be subject to that land tax which would otherwise be outs So the provision "words indicating the masculine gender include females." The argument that these section mere machinery was sought to be answered by showing they applied not only to dutiable goods but also to

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which are free. For instance, it was said that under sec. 234 entries which have to be made with respect to goods that are free must be true, and any false statement in such entries is made punishable. Even if that were so, the fact that part of the section could not be said to deal with the imposition of a tax would not prevent it being upheld so far as it does deal with dutiable goods.

They referred also to *Stewart* v. *Maxwell* (*k*).

Isaacs, K.C., and *Mackey* (with them *Coldham*) for the defendant to move the order absolute—The construction sought to be put on sec. 55 by the informant is historically not the correct one. Its object was to lift the questions with which it deals altogether out of the region of political discussion, and place them for the first time on a legal basis. It is not merely a matter of procedure. So long as you have a mere bill or proposed law you have a matter of procedure, but directly it passes, or purports to pass, into actual law the Constitution assumes a different attitude towards the measure, the object being deliberately to place it beyond the power of the Houses by inadvertence or design to do what the Constitution says is not to be done. The debates in the Convention show that it was moved to insert the words "and collection" after "imposition" in sec. 55, and that it was negatived by 26 votes to 16.

[WILLIAMS, J. We are all of opinion that we cannot look at that. We must interpret the Act as we find it.]

Applying the ordinary rules of interpretation the word "imposition" cannot include "collection" in this section.

[HOOD, J. Is not the position this, that sec. 53 puts a limitation on the Senate, saying in effect to it—"You shall not amend a tax," while sec. 55 enforces that restriction?]

No, for if the Senate insisted on amending, and the House of Representatives said, "Very well, do so," sec. 53 is infringed.

[HOOD, J. But where the Houses are at variance it will prevent quarrels between them. The House of Representatives

(*k*) 16 Howard's Reports 150 and 163.

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will see that sec. 55 makes it useless to attempt to pass through the Senate by tacking it on to a bill which they l the Senate will pass.]

Certainly, but the section goes much further than th is a guarantee to the people of the Commonwealth. Th of *Queen* v. *Burah* (*l*) shows the position of a c Legislature. It is limited strictly to the powers given a area covered by its grant, but within that area it is su It is not a mere delegate. It also shows that these sectior laws imposing taxation from the moment they cam operation. The practice in tacking, as shown by the in cited by the other side, has always been to add the la desired to pass to the annual *Appropriation Act*, the i threat being—"You dare not throw this out, for by doing will throw out the annual service and throw the Stat confusion." So that in framing sec. 55 something mor have been intended than merely to prevent tacking. It pr any mingling of taxation with anything else. It introduces constitutional principle. The words "laws imposing tax denote an Act which imposes a tax and does nothing els does not exclude everything that is necessary to ascert amount of the tax. It includes all machinery, etc., necess its complete imposition, but nothing more. That arg recognizes fully the fact that we do find on the Englis Australian statute books many laws imposing taxation mingle the imposition with the collection and enforceme it says that in future such laws shall deal only with the imp of the taxation. The result of the interpretation sug by the other side—namely, that all machinery for coll enforcement, and penalties is part of a law imposing taxa would be that, if the House of Representatives, finding already imposed, passed a bill making provision or provision for collecting the tax—say by appointing a missioner—the Senate could not amend that. *Nort Shelvy* (*m*) shows the effect of an Act which does not o the Constitution. The definition of "proposed laws" and imposing taxation" suggested by the other side may be

(*l*) 3 App. Cas. 889. (*m*) 118 U.S.R. 425.

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thus:—Suppose an Act is passed which says "The Excise duty on sugar shall be the same rate as Parliament shall hereafter fix as the rate for the Customs duty on sugar." According to the informant's contention, that does not impose a tax at all. Then a tariff is passed imposing a Customs duty on sugar, and fixing the rate. There is certainly an Excise duty on sugar then. Which Act imposes it? Or suppose an Act of Parliament is passed here which says "The income tax in Australia shall be the same rate in any year as the rate of the income tax imposed by the Imperial Parliament," which Act imposes the tax here, the Australian or the Imperial? Now take sec. 140 of the *Customs Act*, which says that goods which are not dutiable shall, under certain conditions, be taxed at the same rates as dutiable goods. That assumes that these goods are not dutiable to start with. Then it is said that is a mere interpretation section. But the difference between this and an interpretation Act is that, where you have a general *Interpretation Act*, saying, for instance, that "person" shall include "corporation," that assumes that "corporation" is in the later Act. The language of the *Customs Act*, however, assumes plainly that the goods struck at by sec. 140 are not within the later Act. The same is true of sec. 148. Apart from that section the authorities are quite clear that the goods struck at by it are not within the tariff. In other words, this argument is that dutiable goods are the goods hit at by the *Tariff Act*. These other goods are not hit by the *Tariff Act*, but they are hit by the *Customs Act*. Sec. 39 is exceedingly strong.

[WILLIAMS, J. That also seems to provide a rule of denomination. It is a rule for the purpose of enabling the Customs officers to follow the dutiable goods with another face on them.

HOOD, J. It seems to me to go a great deal beyond that. Still, the Legislature could have said in the *Customs Act* "Wherever the expression dutiable goods occurs it must be taken as including any article which in the opinion of the Minister can be used as a substitute." That would not be imposing a duty; it would be interpretation.]

Admitting that, it is not what the Legislature has said. It is not enough that they could have effected the same thing by

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different language. Our whole argument is that they could have done it in a different way—that the Constitution says they must do it, if it all, in a different way. Again, take sec. 140—that relating to goods composed of separate parts. In *Shaw* v. *Howden* (*n*) watches were introduced in parts, and it was held that they were not touched by the tariff, because it only struck at watches. If Part VIII. of the *Customs Act* had been a mere interpretation Act there would have been no need to incorporate it. Part VIII. is not to affect duties payable under any State Act—it only becomes operative when the Federal tariff comes into existence. But in passing the *Tariff Act* the Legislature had an eye only to the goods named in the schedule, and then only if those goods were imported in the ordinary way. These other goods are taxed not by it, but by the *Customs Act*, which was from the first a law imposing taxation, though Part VIII. only came into force when the Federal tariff came in. If this *Customs Act* were passed after the *Tariff Act*, could it be said to be an interpretation Act? Clearly not. It would obviously impose taxation. Suppose then, that having been done, the existing *Tariff Act* were repealed and another passed (which is not at all improbable), with the knowledge of the existence of that *Customs Act*, would the latter be thereby converted from a taxing Act into an interpretation Act? According to the other side the Senate could bring in a bill to impose any tax whatever, provided it said, "This is not to come into operation until such and such an Act is passed, and this latter Act might itself be one which the Senate could originate. Take sec. 140 again. Apart from it the parts would not be taxable. The Minister claims to tax parts and is challenged. To what Act would he refer to justify his claim? It would be useless to refer to the *Tariff Act*. He would be thrown back on sec. 140 of the *Customs Act*. *Cf.* also *Attorney-General* v. *Saggers* (*o*). These are not stray sections. They form a separate part of the Act, and are expressly left to lie dormant until the *Tariff Act* is passed. They mean an enormous revenue, which would never be obtained but for the *Customs Act*. They alter the law so as to increase the

(*n*) [1883] 9 V.L.R. (L.) 102. (*o*) [1814] 1 Price 182, at p. 194.

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burden on the people. Take sec. 138; the Common Law rule is that where an Act enacts two inconsistent or different duties or taxes, the lower one only is imposed: *South Staffordshire Waterworks Co.* v. *Barron* (*p*). That section alters that Common Law rule, and says that in such a case the higher one is the one imposed. How can that be called interpretation? What language in the *Tariff Act* does it interpret?

[HOOD, J. It seems to me that it is interpretation. There are two possible interpretations of the Act, and this section says which is the one to be applied.]

That is construction, not interpretation: *Liebenroth* v. *Robertson* (*q*) is an authority that such a clause imposes a duty; so with flotsam, jetsam, etc., under sec. 148. The *Tariff Act* (sec. 5) only makes the duty payable "on all goods dutiable under the schedule *imported* into Australia." It was established as early as Lord Raymond that goods flotsam, wreckage, etc., are not "imported." Indeed, sec. 148 assumes that, but still charges them with duty. So secs. 139 and 140 expressly distinguish between the goods made liable to duty thereby and "dutiable goods," which are goods otherwise dutiable. Shortly put, our argument on this head is that the *Customs Act* assumes that the *Tariff Act* does not hit certain goods, and says:—"Because there are no words in the *Tariff Act* which touch these goods—no words imposing taxation in these cases—we hereby say these goods shall be taxed, we hereby impose taxation." The moment you can point to a provision on the Statute Book by virtue of which money is claimed by way of taxation from the subject, you have a "law imposing taxation." It does not matter that the Statute did not operate immediately on its passing so as to enable the money to be claimed, or that it could only be claimed on the fulfilment of a condition. In such a case once the condition is fulfilled, no matter what that condition is, the Statute is a "law imposing taxation." The informant is really trying to read into sec. 55, after "laws imposing taxation," the words "which operate immediately they are passed or which operate at some future time provided the condition of their

(*p*) [1897] 13 *Times* L.R. 549. (*q*) 144 U.S.R. 35, at p. 40.

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operation is not the passing of a future Act of Parliament." The interpretation we contend for leaves the words as we find them. The judicial parts of this Act were passed under the part of the Constitution relating to "Judicial Power of the Commonwealth," other portions under the "Trade and Commerce" part, and this particular portion under the "Taxing Powers." All three are mixed up in the one Act, which is what the Constitution forbids. Again, according to the informant's contention, the Senate could originate a bill repealing Part VIII. of the *Customs Act*, and could then proceed to re-enact it in the very words used by these sections with any alterations or additions it thought fit. The case of *Stewart* v. *Maxwell* (*supra*) is really in our favour. Again, take the incorporating section in the *Tariff Act*; the effect of that is that the Court must read the two Acts as one. It is not merely that the provision with regard to incorporation is illegal, and therefore ineffectual. "In such a case you are to read every part of such Acts as if it were part of one Act:" Per Lord Selborne, in *Canada Rly. Co.* v. *International Bridge Co.* (*supra*). The two Acts actually become one, with a certain result—namely, that all provisions in either Act which deal with anything else than the imposition of taxation are of no effect. The Constitution does not say you must not put other provisions in. It says rather that if you put them in they shall be of no effect.

They also referred to *Dudley* v. *Wormington* (*r*).

Cur. adv. vult.

May 14.

WILLIAMS, J., read the following judgment:—This is an order *nisi* to review referred to the Full Court.

The complainant is the Collector of Customs for Victoria, acting as such for the Commonwealth Government. He sues the defendant to enforce the penalty imposed by sec. 234 of the Commonwealth *Customs Act*, 1 Ed. VII., No. 6, on the charge of having been unlawfully concerned in making, in a certain declaration mentioned in the information, certain false statements within the meaning of sec. 234 and sec. 236 of the same Act.

(*r*) [1881] 50 L.J.M.C. 69.

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Sec. 245 of the said Commonwealth *Customs Act* provides that such a prosecution as that in question here may be instituted in (amongst others) any court of summary jurisdiction, and sec. 248 of that Act gives an appeal from any conviction, order for condemnation, or order for dismissal to the court, and in the manner provided by the law of the "State where such conviction or order is made for appeals from convictions or orders of 'dismissal.'" The prosecution was under secs. 234, 236, and 245 of the Federal *Customs Act* 1901. The defendant was convicted before the justices of an offence under secs. 234 and 236. The defendant then obtained an order *nisi* to review the decision under sec. 141 of the *Justices Act* 1890 of the State of Victoria, on the grounds set out in that order, and this order *nisi* has been referred to us for decision.

The question for us to consider is whether that conviction was right or wrong. The only grounds in the order *nisi* which it is necessary to deal with are grounds 4, 5, and 6, as we have heard no arguments addressed to us on grounds 1, 2, and 3, and they have been virtually abandoned. In other words, the grave question we have to determine is whether certain sections of the Federal *Customs Act* 1901 are of no effect.

It is as well at the outset to observe that we have had lengthy arguments addressed to us based upon the views held by members of the Federal Convention upon the scope, purview, and effect of secs. 53 and 55 of the *Commonwealth Act*, and the fact has been pressed upon us that the Federal Senate freely altered and amended the sections of the *Customs Act* 1901, which are now said to be laws imposing taxation. The Court is of opinion that, in construing those two Acts, it should confine its attention to a consideration of the two Acts, and that such matters as I have mentioned should in no way influence its judgment.

This serious question has already been decided by the Chief Justice. He has held the sections of the Act which relate to this prosecution and conviction to be invalid and of no effect, and if his decision be right the conviction of the defendant is wrong, and this order *nisi* must be made absolute. Necessarily, therefore, we have to decide whether the judgment

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of the Chief Justice be right or wrong. We are of opinion that the judgment of the Chief Justice is erroneous; that grounds 4, 5, and 6 of the order *nisi* cannot be supported; that the conviction must stand, and the order *nisi* be discharged.

What we have to consider is whether certain sections of the Federal *Customs Act* 1901 are in violation of the prohibition contained in sec. 55 of the *Commonwealth of Australia Constitution Act*, and whether, therefore, those sections are of no effect. Sec. 55 is, in my opinion, a section relating to procedure—to procedure as between the two Houses, the Senate and the House of Representatives. It is a section evidently in aid of, or as a supplement to, sec. 53. By sec. 53 the Senate is prohibited from amending any law imposing taxation, and as a supplement to that, sec. 55 provides that if any law not dealing with the imposition of taxation be annexed or attached to or contained in any law imposing taxation, the law so annexed or attached or contained is of no effect whatsoever. The result is that the Senate, in passing a bill imposing taxation, which includes within it or attached to it provisions dealing with another matter foreign to the imposition of taxation, not only gives no validity whatsoever to the provisions dealing with such other matter, but such provisions are absolutely invalid and of no effect. That appears to me, putting it shortly, the interpretation and effect of secs. 53 and 55 of the *Commonwealth of Australia Constitution Act.*

Do the sections in question of the Federal *Customs Act* 1901, then, fall within the prohibition contained in sec. 55? If they do, that portion of the Act under which the prosecution in this case took place, and under which the defendant was convicted, is invalid and of no effect. We have, therefore, to consider whether Part VIII., or any part of Part VIII., of the Federal *Customs Act* 1901 imposes taxation. I do not think it does. The *Customs Act* was passed before the *Tariff Act.* Looking at the former Act at the time it was passed, which, as the Chief Justice says, is the proper way to look at it, it was clearly not an Act imposing taxation. When the *Tariff Act* came into force subsequently, Part VIII. of the *Customs Act*, meanwhile suspended, came into operation. I

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think that, read with the Federal *Tariff Act*, the provisions contained in Part VIII. of the *Customs Act* are merely declaratory, or for the purpose of interpretation or definition, or prescribing rules of denomination or machinery provisions for carrying out and enforcing the *Tariff Act*. These provisions in Part VIII., to which I refer, are evidently framed chiefly for the purpose of preventing the importation of goods in disguise or by devices so as to evade payment of duty on goods which they represent, or for which they are substitutes, or of which they form part. The Chief Justice, in his judgment, selects certain sections of Part VIII. as instances of provisions which, in his opinion, impose taxation—secs. 138, 139, 140, 141, 144, and 148. We have carefully considered these sections, and they are all, in my opinion, sections of interpretation or definition, machinery, or prescribing rules of denomination, or declaratory.

Taking sec. 139 as an example, as it appears to be the strongest section that can be selected in support of the view taken by the Chief Justice. If that section can be rightly held to be declaratory, or a section of definition or interpretation, machinery, or as containing rules of denomination, and not a section imposing taxation, it is obvious that the other sections upon which the Chief Justice relies should bear the same construction. Sec. 139, in my opinion, *pro tanto*, defines dutiable goods, and declares that the term "dutiable goods" shall include all goods which, in the opinion of the Minister, are substitutes for dutiable goods; that these substitutes shall be charged as such dutiable goods after notification in the *Gazette* by the Minister. The first part of this section relates to interpretation or definition, or enacts rules of denomination for ascertaining goods that are dutiable; the latter portion may more properly be said to be machinery. To put it shortly, these sections which have been selected by the Chief Justice seem to provide means for ascertaining or defining, or declaring, what goods or parts of goods are included in the various classes of goods covered by the tariff, and for preventing, by ingenious disguises and tricks, the free importation of goods which would otherwise be dutiable. There is one other section which has been much relied on, to which I may very shortly

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refer—sec. 148, the flotsam and jetsam section; this section appears to me to be declaratory that goods thus brought into the State are to be considered as if imported in the ordinary course. It is abundantly clear that this *Customs Act* is not in violation of the spirit of the prohibition contained in sec. 55 of the *Commonwealth Act*, nor in my opinion is it in violation of the letter of that prohibition.

There is another point which I may refer to, not indeed necessary to our decision, and therefore what I say upon it may be fairly considered *obiter*; nor do I feel nearly as clear upon this point as I do upon the point with which I have already dealt. That other point is this, that assuming various sections of Part VIII. of the *Customs Act* to be a law imposing taxation, it does not contain "other matter" within the meaning of sec. 55; or, to put it more accurately, and this is all it is necessary to consider in the present case, secs. 234, 236, and 245, under which the present prosecution and conviction took place, are not such "other matter." These sections cannot be said to be matter foreign to the imposition of taxation; they are parts of the machinery provided for the enforcement of the tax, and, if so, they may be held to be an almost essential part of an effective measure of taxation.

In conclusion, I desire to draw attention to the fact that the words used in sec. 55 are "laws imposing taxation." The Chief Justice seems to have interpreted these words as meaning "for the purpose of imposing taxation." This is not, I think, a legitimate reading.

The order *nisi* will be discharged with costs.

A'BECKETT, J., read the following judgment:—In this case we are asked to say that the sections of the *Customs Act* under which the prosecution was instituted are of no effect, and to do so on a ground which leaves it doubtful what parts of the Act are law and what are not. The learned Chief Justice says he is not very sure of sec. 141, but thinks it does impose a tax. In argument sec. 132 and other sections have been referred to which might be valid or invalid according to the view taken of their present or contingent operation with regard to taxation.

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We should be careful before adopting a construction which reduces the Act to this deplorable plight. If the words to be interpreted are clear, no consideration of consequences should deter us from giving full effect to them; but, according to all authority and all reason, if their interpretation be open to doubt, we should incline to an interpretation which would preserve rather than destroy. But for the weighty judgment of the learned Chief Justice, I should not have thought it necessary to refer to this rule of interpretation, and should have said that the plain meaning of the words of sec. 55 excluded the objection taken to the *Customs Act*, and that they had to be strained and artificially enlarged before they would admit of it. The literal construction seems to me in accord with the objects which sections 53 and 55 were framed to attain, and to give all necessary security for their accomplishment. The extended construction has difficulties and dangers which may frustrate Legislative intentions given effect to, as in the case before us, without any supposed departure from constitutional rules. The whole question of interpretation we have to answer is—"Is the *Customs Act* a law imposing taxation within the meaning of sec. 155?" If it is not, there is an end of the case; the Act is valid in all its clauses. We have to say what is meant by a law, and at what period it is to be regarded in considering whether it imposes taxation or not. I should say that "law" means the Act of Parliament—that is, the document to be construed; the time at which we are to regard it in applying the test is that at which the Act comes into force. On the first point there has been no contention; on the second, our view is in accord with that of the Chief Justice. He says:—"Again, it was contended that the *Customs Act* was an enactment merely conditional on a *Tariff Act* being passed, and that for the purpose of testing it in view of sec. 55 of the *Constitution Act* one must regard its effect on the very day it passed . . . . and this is, I think, a proper view" (*ante*, pp. 220, 221).

The *Customs Act* 1901 is an Act preparing the way for an Act imposing duties of Customs which, under sec. 88 of the *Commonwealth Act*, had to be imposed within two years after the establishment of the Commonwealth. Its 277 sections contain

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all the necessary provisions for the ascertainment and collection of these duties, and for penalties on attempts to evade them—a comprehensive system dealing with all questions supposed to be likely to arise, so complete that the *Tariff Act* which imposed the duties was contained in five sections only, referring to certain schedules. Looking at the general scope of the *Customs Act*, no one would describe it as an Act imposing taxation, though it would be obviously an Act framed in anticipation of taxation to be afterwards imposed, and to make that taxation effectual. It has not been contended that, because it contemplated the imposition of taxation, it was to be itself considered as a law imposing taxation. The attack has been made upon a few sections in Part VIII. These are fully dealt with in the judgment of the learned Chief Justice, and he shows that, when the *Tariff Act* passed, these sections had the effect of making liable to duty certain things which, without them, would not have been so liable. Perhaps the strongest instance is sec. 139, which provides that whenever goods are imported which, in the opinion of the Minister, are a substitute for dutiable goods, he may direct, by *Gazette* notice, that such first-mentioned goods shall be charged with the same duty as the dutiable goods, and that they shall be charged accordingly. So sec. 140 provides for the same duty being paid upon parts of goods as upon complete goods in certain instances; sec. 136 upon reputed quantity, not upon actual quantity; sec. 148 upon goods derelict, flotsam, or jetsam, as if imported. These sections cannot properly be called mere interpretation clauses. It matters not what name should be given to them, if they cannot properly be called clauses imposing taxation. Why I say that they cannot be so called is that in themselves they created no liability to taxation. They were altogether inoperative until by subsequent legislation the duties were imposed which these sections provided should fall upon certain goods in certain cases. The *Tariff Act* imposed the tax; these sections merely specified certain goods upon which the tax when imposed should fall. It is scarcely necessary to observe that the framers of the *Tariff Act* were in no way bound by the *Customs Act*, and might have specifically included these goods, or might have expressly excluded them from

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taxation. They were under no compulsion to avail themselves of the anticipatory provisions which were made as most convenient for dealing with exceptional cases.

Coming back to what is to me the starting point, and asking—Is the *Customs Act*, because of these clauses, a law imposing taxation? I say no, because when the Act came into force there was no tax which these clauses could impose. They could not touch anyone or anything until the Legislature had effectually created the tax which they had in contemplation. If by any means other than legislation these clauses could ever operate to lay burdens upon the subject, I should consider them differently. Merely postponing the operation of the Act to a future date, or providing for something to be done in the future, by force of the Act, unassisted by new legislation, would not prevent the Act from being one imposing taxation within the meaning of sec. 55. If, for instance, the Minister, as to substituted duties, were empowered to fix a rate for himself, without reference to rates to be fixed by Parliament, the objection taken could be sustained. The learned Chief Justice acknowledges that the Act when it passed did not impose taxation, but he says:—"The words 'imposing taxation' in sec. 55 must, I think, be read as 'for the purpose of imposing taxation,' *i.e.*, whose object is to impose a tax, whether at the moment or in the future, or conditionally in the future. . . . If, then, this *Customs Act* be judged, as it is said is the test, as on the day it passed, the sections of Part VIII., which are being discussed, were assuredly laws for the purpose of imposing taxation, which is what I think sec. 55 must mean." Here I differ from him. I think that sec. 55 means only what it says, and that the contests and jealousies to which secs. 53 and 55 owe their origin supply reasons for adhering to the literal construction. There can be no danger in permitting the Senate to amend a measure such as this, which can impose no burden until the burden is deliberately imposed by further legislative action of the character which the measure openly contemplates. Here is no insidious introduction of something which, by future legislative inadvertence, might be converted into a tax. No one could misapprehend the object or effect of the clauses in question,

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which both Houses must be taken to have adopted, conside that they did not transgress sec. 55, and unless we see cl that there has been a transgression we should not help ingenuity to construct one. Counsel felt the difficult maintaining his position if the time when the Act came force was the time to be regarded in determining whether it a law imposing taxation or not, and contended that the when an offence against it was committed or dealt with b Court was the proper period. This is opposed to the vi the Chief Justice and of this Court, and would intr dangerous uncertainty. Legislative changes, not di dealing with the measure, might alter its character from ti time. It might be altogether good one year, destroyed as but a few sections in another, and restored to complete va in the year following. But the best reason for saying tha time when it passes is the time to be considered seems to be that the section is intended to secure the observan certain rules of Parliamentary procedure and the preservati certain rights as between the two Houses at the time whe proposed measure is being made into law. If these are observed, and the measure is launched, its framers h observed the conditions of sec. 55, they have exercised constitutional rights, and have broken through no constitut restrictions. Their Act is good once and for all, and not retrospectively invalidated because some subsequent exerc Legislative authority gives it an operation which it ha when it left their hands.

HOOD, J., read the following judgment:—I do not find it to aptly describe the legislation contained in Part VIII. o Federal *Customs Act*. It is a sort of forewarning as to will happen when the *Tariff Act* is passed. It contains guards for protecting the revenue, for preventing evasio duty, and for widening the meaning of words about to be in the *Tariff Act*, and the object is to enforce the spirit o Act as well as its letter. Undoubtedly the effect is to certain articles liable to duty that would not otherwise But it is a mistake, I think, to say that a section is

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imposing taxation simply because the effect of the section is to make some otherwise free articles dutiable. A great deal more must, in my opinion, appear before a section is obnoxious to the provision of sec. 55 of the Federal *Constitution Act*. That section is one of a group of four regulating the procedure and relations of the two Houses in the initiation and amendment of legislation. The expression "laws imposing taxation" seems to me to be a special phrase relating to a particular constitutional class of legislation; no definition is afforded by Parliament, and none suggested seems quite satisfactory. But the section, like every Act of Parliament, is to be considered according to its subject-matter, and in relation to the evils sought to be cured. The subject-matter is Parliamentary practice. The evils to be remedied are disputes between the Houses, leading possibly to what I may call "strikes." Sec. 55 affords a novel, but probably a satisfactory mode of settling such disputes by means of judicial decisions. That section was not, in my opinion, enacted for the benefit of the public. If Parliament agreed on any subject-matter, it could not be prevented by the operation of sec. 55 from placing the legislation properly upon the Statute Book. The section would only regulate the manner in which the legislation should be carried out, and I think it is not to be read so as to include any and every section that increases the orbit of taxation. Such a mode of reading it would include the *Interpretation Act*, and probably many others that I, for one, would never dream of calling taxing Acts.

Turning to Part VIII. of the *Customs Act*, sec. 139 was one upon which most reliance was placed. That section seems to me merely a declaration that, when the tariff mentions a particular article as dutiable, it is to be read as covering any substitute which the Minister may proclaim. As to this section, I was at first impressed by the decision in *Powell* v. *The Apollo Co.* (s). But there is a clear distinction. The Legislature there had enacted that, whenever any article possessed properties which could be used for purposes similar to the dutiable article, the Governor was to levy a duty on that article. There the duty on the similar article was imposed by the section in

(s) 10 App. Cas. 282.

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question. But there is a great difference between saying that a third person may levy a duty, and saying that, in a tariff about to be passed, any substitute for a named dutiable article is to be included as dutiable. In the first instance, the duty is imposed by the legislation. In the other, no duty is imposed till the tariff is passed, and then that tariff is to be construed in a particular way. So with sec. 148. That is a statement that, in administering the tariff, certain goods will be considered as imported goods, though they are not strictly such. And I think that the other sections referred to can be looked at in a similar light. I do not agree with the general proposition that a law may escape from the veto in sec. 55 of the *Constitution Act*, merely by making it conditional, or by postponing its operation, nor do I think that a law is to be judged in relation to sec. 55 by its effect on the very day it passed. Such a course would make sec. 55 inoperative, as it could be so easily avoided. But while that is so as a rule, yet in this case the fact that the particular sections were not to have any force till the *Tariff Act* was passed goes far to explain them, and to show that they are not, and never were, "laws imposing taxation."

There are other matters of great importance, dealt with by the learned Chief Justice, and the Attorney-General in his interesting argument, which, owing to our decision being adverse to the defendant, we need not consider.

Order nisi discharged.

Solicitor for the informant: *Croker.*
Solicitors for the defendant: *Gillott, Bates & Moir.*

J. M.

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In re CITY TATTERSALL'S CLUB, *Ex parte* OLIVER.

MADDEN, C.J.

1903
August 14.

Licensing—Licensing Act 1890 (*No.* 1111), *ss.* 3, 4 (8), 58—*Club, certificate to—Second certificate in respect of same premises—Special case—Application for case to be stated.*

A special case cannot be stated in respect of the refusal of the Licensing Court to grant a certificate to a club.

A second certificate cannot be granted to a new club in respect of premises for which another certificate has already been granted, and which certificate is still in existence.

Where an application in writing for a special case has been made by leaving the same with the clerk of the Licensing Court, and the Licensing Court has stated a special case, that is a sufficient compliance with the provisions of sec. 58 of the *Licensing Act* 1890, although such application has not been made to the Court itself while sitting as a Court.

SPECIAL CASE under the provisions of sec. 58 of the *Licensing Act* 1890. The following was the case as stated:—

"Under the provisions of sec. 4, sub-sec. 8, of the Act the Court on 1st June 1903 refused to certify that 'City Tattersall's Club' was a club within the meaning of the Act.

"The Court held on the evidence that the association known as 'City Tattersall's Club' was not an association united for the purpose of providing accommodation for and conferring privileges and advantages upon the members of the association only. The Court also held that the privileges and advantages of gambling on the club premises were not confined or limited to members of the association only, but that bookmakers and other members of the association gambled on the club premises on behalf of friends and clients who were not members of the association, and that these friends and clients of members of the association were entitled to derive the benefits, profits, and advantages from gambling through their agents, who were members of the association. For this conclusion the Court would refer the Supreme Court to the evidence of Michael Boland, who stated 'We have advertised for bookmakers to ply their vocation at the club.' Martin Wencke, who stated 'I have large commissions from my friends to put on money for them. I put on money if my friends send me cheques or wire the money to me. It suits me to put a little on for my country

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clients.' And James Donahoo, who stated 'I would use the club to bet for my clients on commission.' And the other evidence produced on the hearing. Finding thus on the facts, the Court decided as a matter of law that the association known as 'City Tattersall's Club' was not a club within the meaning of sec. 3 (the interpretation section of the Act). The Court also decided that, inasmuch as the club certificate, dated 15th July 1891—a copy of which is hereunto annexed—was still in existence, and referred to the same premises in respect to which the association known as 'City Tattersall's Club' asked for a club certificate, it could not or should not grant a second certificate in respect of the same premises till it directed that that certificate should no longer be of any force or effect: See sec. 3, definition of club, sec. 4, sub-sec. 8, and sec. 72 of the Act. The questions for the opinion of the Supreme Court are whether such determinations of the Court were erroneous in point of law.

"A copy of the notes of evidence is annexed. The application was refused on 1st June 1903.

"Counsel in Court intimated that 'City Tattersall's Club' desired to appeal to the Supreme Court.

"No written application was made to the Licensing Court, but the document annexed, marked 'A,' was handed to Judge Molesworth whilst sitting in another jurisdiction on 1st July 1903."

The document "A" was a notice in the ordinary form asking for a special case to be stated, and was addressed to the Licensing Court, and served on the clerk of the Court, and by that clerk was handed to His Honor Judge Molesworth while sitting in another jurisdiction. Judge Molesworth was the chairman of the Licensing Court that dealt with the application for the certificate.

It did not appear from the evidence whether or not the Licensing Court did sit again within a month, but it was stated during the argument that it was the practice of the Court in Melbourne to sit every month. It is not considered necessary for this report to set out any further evidence as to the transactions of the members of the club with respect to the mode in which bets were made.

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It appeared from the evidence that a certificate for the same premises had been granted to a club called "Tattersall's Club," which club had left the premises and carried on the club in Royal-lane.

Gaunson for the appellant—The application for a special case was rightly made by serving a written request upon the Clerk of the Court. It may happen, and frequently does happen in the country districts, that the Court does not sit again within the month, and no application could be made under sec. 58 to the Court itself while sitting as a Court. In this case the Court has stated a special case, and that is sufficient. The Court held that this association was not a "club" within the meaning of sec. 3, on the ground that persons outside the club obtained advantages not shared equally by every member of the club, but it is submitted that it was open to each member to act as a commissioner for some person outside, and the privilege of making bets was shared equally by every member of the club. The fact that another club had at one time obtained a certificate for these premises does not preclude the Court from issuing another certificate to a *bonâ-fide* applicant where the evidence shows distinctly that the former club has ceased to occupy such premises. The former certificate lapses, and there was no necessity to cancel it.

The following cases were referred to:—*Downes* v. *Johnson* (*a*), *Cromarty's Case* (*b*).

Cussen for the Licensing Inspector—The Court had no jurisdiction to state a special case. It was held in the case of *In re The Melbourne Democratic Club* (*c*) that the cancellation of a club's certificate was purely a matter of discretion, and that the provisions of the Act as to procedure did not apply to a club at all; that when once a certificate was granted the club was outside the Act. If sec. 68 did not apply to an application by a club, then for the same reason sec. 58 would not apply. By sec. 58 it is provided that the application for a special case must

(*a*) [1895] 2 Q.B. 203. (*b*) *Argus*, 10th January 1890.
(*c*) [1901] 27 V.L.R. 88.

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be made to the Court itself while it is sitting as a Court. applicant for a certificate for a club has no statutory rig all; the Court has an absolute discretion to grant a certific to withhold it, and also a similar discretion to cancel onc granted. This club, according to the evidence, would gaming house: *Jenks* v. *Turpin* (*d*). The primary intent the Act was to look to the question of accommodation main essential of a club, and if the betting is the main ob this club, and the accommodation purely nominal, it would within the meaning of a gaming house. The Court cou grant a second certificate while a former certificate for the premises was outstanding. The certificate is connected wi premises, and if a second certificate were granted there wo nothing to prevent the holder of the first certificate coming and occupying a portion of the premises.

MADDEN, C.J. As to the first point, whether the Cou jurisdiction to state a case or whether the applicant had a to require a case to be stated, I think that what is d in the case of the Democratic Club by the Full Co strongly suggestive as to this present case, which is under sec. 58. I think it is very possible that a case as this has been stated would be sufficient, that is, for instance, the Court sits and terminates its sitting befo month has elapsed which the Act allows for an applicati state a case, and that court may not sit again, and there be no possibility of making the statutory application. been pointed out that it sometimes happens that that diff does present itself, but it was urged that if the Act is clea there was no court to which the application could be mad the person desiring a case must put up with that inconve and loss. On the other hand, however, where the court chooses to state a case upon a demand which is made in w and within the month, although such demand is not formally to it while still sitting as a court, I think tha would be a sufficiently well stated case. I think that in of this kind, in proceedings of this sort, and with referen

(*d*) [1884] 13 Q.B.D. 505.

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a court so indefinite as to regularity of sitting, I should hold that this was a sufficiently stated case.

In the case of the Democratic Club the decision turns upon this—that sec. 4, sub-sec. (8), with the definition of a club given in sec. 3, and followed by the provisions of sec. 72, forms, so to speak, a legislative isolation apparently unconnected with the rest of the Act, and that it stands by itself, and therefore the other sections of the Act do not apply to the subject-matter legislated upon by those parts of the Act I have referred to. The Full Court held that sec. 68 did not apply to those particular parts of the Act, and if that be right, then sec. 58 could not apply, and sec. 58 is as much isolated from such parts as sec. 68. The result is that, in this case, and in any case depending upon sec. 4, a case cannot be required to be stated, and need not be stated. That would dispose of this case as to its form.

As to the substance of the case, I would be satisfied, on the same authority, that the Licensing Court, having a discretion to pursue, and its own methods of inquiry as to whether in its discretion it ought to grant a certificate to a club—to an applicant within the meaning of the Act—might take its own methods of ascertaining whether the applicant here was a club. It might decide it was not, and perhaps the refusal here given would be quite sufficient answer. (His Honor read the reason set out in the case.) The Court, however, goes on to find specifically a fact first, and then to determine as a matter of law that the applicant could not be a club within the meaning of sec. 3. The point upon which it decides it is this:—While it contemplates that it is a club with members constituted as such, yet because some of the members of the club, being "commissioners," betted for other people not members of the club, and might bet for the benefit of persons outside who were non-members, that that would be a contravention of sec. 3, which provides that "no person shall be entitled to derive any benefit, profit, or advantage from the club which may not be shared equally by every member thereof." I do not think the transaction which the Court relies upon as being a contravention of sec. 3 would be of such a character as to bring it within the clause. One member of

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the club may bet with another member of the club, and that is not a matter in which every member of the club shares equally; the bet may also be for the advantage of someone outside. I think the ground stated by the court as a fact upon which it based its conclusion of law is not a sound ground. If this were a case with which I could deal in the ordinary way—that is, a case where the court below was entitled to exercise not an absolute discretion, but a judicial discretion—I should say it was a wrong conclusion.

I think, however, the other ground is a sound one: it decided that there was already an existing certificate, and that that certificate referred to these very premises as the locality on which the City Tattersall's Club was to carry on its business, and I think the Court was right. It held that while it is a certificate, and it is in existence for premises 222A Bourke-street, which premises were occupied by a club, being Tattersall's Club, that it would not be competent, without first cancelling such certificate, to grant a new certificate to a new applicant. It was said that that would be inconsistent with the provisions of the Act, that it might be that Tattersall's Club might come back again to the same premises, or to part of such premises by virtue of the certificate already applying to 222A Bourke-street. But it might well happen that a club might obtain a certificate for premises which were palatial as to accommodation, and in respect of which a certificate would be readily granted, and then shortly afterwards such club could go away to a hovel and occupy that. Then a new club could apply for a certificate for the attractive premises, and, obtaining one, could itself go to a smaller edifice, and so on. I think the view taken by the Court is one which it certainly was at liberty to take, and was one which it might take with great propriety. I am also led to the view that the Court was right in its decision, and that generally speaking they have an absolute right, uncontrolled by any rules of evidence or process of investigation, in their own discretion to say whether a club is a club; they have the right afterwards on their own motion to say that a club is no longer a club, and to cancel the certificate. The discretion is very wide, and it would be very difficult for this Court to interfere with it.

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ground is right, and in addition to that, even if ecial case cannot be stated in respect of it. I decide, favour of the objector.

s for the applicant: *Gaunson & Lonie.*
for the objector: *Guinness*, Crown Solicitor.

W. H. M.

HODGES, J.

1903
April 23, 24, *June* 11.

MUELLER *v.* GAIR *and Others.*

—Companies Act 1900 (*No.* 1699), *s.* 3, *sub-ss.* (1) *and* (3)—*Protec-icy moneys from creditors—Married Women's Property Act* 1890 *s.* 14—*Policy for benefit of wife—Death of wife before husband—rust—Marshalling assets.*

of sec. 3, sub-sec. (3), of Act No. 1699 is to protect the policy ng at death of assured, and in which he has a property or interest, ors of the assured without any limitation as to the amount, unless ress direction in the will of the assured to apply them to the debts.

band insures his life for the benefit of his wife within sec. 14 of *omen's Property Act* 1890, and the wife predeceases her husband, eys result to the husband.

Allen v. *Edmonds* ([1886] 12 V.L.R. 789) applied as to marshalling

TING SUMMONS.

an originating summons taken out by Alice Mueller Mueller by Franz Barfus as their next friend against r, as administrator with the will annexed of Cecile also as executor of the will of Arthur Mueller, and . Peterson and Co. on behalf of themselves and all tors of the said Arthur Mueller. The question the administration was as to the right to the certain policies of insurance.

lavit filed on behalf of the plaintiffs stated that ler died on the 11th November 1902, leaving a ch, after the death of Arthur Mueller, her husband, her property to her children, the plaintiffs; that eller died on 12th November 1902, leaving a will after the death of his wife, Cecile Mueller, he property to his children, the plaintiffs. In July

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1887 Arthur Mueller effected a policy of insurance on his life in the New York Life Insurance Co. for the sum of 1000*l.*, the said policy being taken out in favour of Cecile Pfleger, his intended wife, whom he afterwards married in 1889. The policy contained the following clause:—"And the company doth hereby promise and agree to pay the amount of the said insurance at its office New York to Cecile Pfleger intended wife of the insured her executors administrators or assigns." The insurance company paid to M. J. S. Gair, as administrator of the estate of Cecile Mueller, the sum of 686*l.*, being the net amount due under the policy after deducting the amount of a loan made by the company to Arthur and Cecile Mueller jointly during their lifetime. Arthur Mueller also insured his life for the benefit of his wife and children in three other policies, for the sum of 1500*l.* in one policy and in two sums of 1000*l.* each in two other policies. The premiums were paid by Arthur Mueller himself. One policy, effected in 1896, for the sum of 1000*l.*, was taken out for the benefit of his wife, the others for the benefit of his wife and children. The administrator stated that, omitting the amounts due under the policies, the assets of the estate of Arthur Mueller were insufficient for the payment of his debts. The creditors claimed that the sum of 686*l.* was an asset in the estate of Arthur Mueller for the payment of his debts. The following declarations were asked by the summons:—(1) That the sum of 686*l.*, the net proceeds of the policy of insurance for 1000*l.* in the New York Life Insurance Co., is (*a*) assets in the estate of Cecile Mueller and not assets in the estate of Arthur Mueller; (*b*) not assets for the payment of the debts of Arthur Mueller; (*c*) the property of the plaintiffs. The following further questions were added:—(2) Whether or not the proceeds of the policy of insurance for 1000*l.*, taken out in April 1896, are (*a*) assets in the estate of Arthur Mueller; (*b*) available for payment of his debts. (3) Whether or not the creditors of the estate of Arthur Mueller are entitled to have his funeral and testamentary expenses and the probate duty payable on his estate paid (in relief of his general assets) out of such policy moneys as are protected against his debts by sec. 3 of Act No. 1699?

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Mitchell for the plaintiffs—The policy of 1887, being settled upon the wife in consideration of marriage, forms part of her estate. The policy effected for the benefit of the wife in 1896 comes within sec. 14 of the *Married Women's Property Act* 1890, and vests in the wife so as to form part of her estate on her death. At any rate, if that contention be wrong, and if one of the policies be held to come into the estate of Arthur Mueller, it is protected from the payment of his debts by sec. 3 (3) of Act No. 1699. The intention of the Legislature was to protect the whole of a person's insurance money for the benefit of his family unless there was a special direction in the will to apply the moneys to the payment of debts. The creditors are not defrauded by this scheme of legislation. They lose nothing except the amount of premiums, and there is a provision in the section as to premiums. The object of life insurance is to benefit the family of the assured, and this section gives full effect to it. The first sub-section of sec. 3, which limits the amount of insurance money thus available to 1000*l.*, does not govern sub-sec. (3), and the words "except as hereinafter provided" show that it was to be subject to the further provision in sub-sec. (3): *Piper* v. *Bank of New South Wales* (*a*).

Hayes for the defendant Gair.

Davis for the creditors—There is no evidence sufficient to support a settlement so far as the policy of 1887 is concerned. Sec. 14 of the *Married Women's Property Act* 1890 regulates the mode of settlement. That there was a resulting trust is shown by the case of *Re a Policy of the Scottish Equitable Life Company* (*b*). As to the policy of 1896, the effect of sec. 14 of the *Married Women's Property Act* is that if the wife predeceases the husband the benefit of the policy reverts to him, the object of the trust having failed: *Porter on Insurance* (3rd ed.), pp. 355 and 356; *Re Adams's Policy* (*c*). The *Companies Act* 1900 (No. 1699), sec. 3 (3) is intended to protect policy moneys in which the assured has "property" or "interest," and the amount

(*a*) [1897] A.C. 383. (*b*) [1902] 1 Ch. 282.
(*c*) [1883] 23 Ch.D. 525.

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available is limited by the first sub-section to 1000*l.* If the 1000*l.* of the 1896 policy "results" to the husband it is not protected by Act No. 1699, because it is not a policy in which he has a "property" or "interest," and therefore it is assets for the payment of debts. Sub-sec. (1) of sec. 3 governs the whole section; the words "except as hereinafter provided" refer only to execution and insolvency. Sub-sec. (3) is quite inconsistent with the preceding sub-sections, and it was not meant to be read apart from the governing clauses of the other sub-sections, but to be dependent upon them.

Counsel referred to *Allen* v. *Edmonds* (*d*).

Cur. adv. vult.

HODGES, J., read the following judgment:—In July 1887 Arthur Mueller effected a policy of insurance on his life in the New York Life Insurance Company for 1000*l.* Such money was by the policy expressed to be payable on his death to Cecile Pfleger, his then intended wife. The indorsement on the policy is in the following words:—"And the said company doth hereby promise and agree to pay the amount of the said insurance at its office New York to Cecile Pfleger intended wife of the insured her executor administrator or assigns."

In March 1889 the said Mueller married the said Pfleger. In 1900 the husband and wife obtained a loan from the said New York Company on security of the said policy. On the 11th day of November 1902 the said Cecile Mueller died, and on the 12th day of November 1902 the said Arthur Mueller died. The Muellers left two children—Alice and Robert Mueller—who are the plaintiffs in this proceeding. Mr. Gair, one of the defendants, is the administrator, with the will annexed, of the estate of Cecile Mueller. He is also executor of the will of Arthur Mueller. The New York Company has paid to Mr. Gair, as administrator, 686*l.* 11*s.* 2*d.*, the balance due under the said policy. This sum is claimed by the plaintiffs, the children, as beneficiaries under Mrs. Mueller's will. It is also claimed by the creditors of the late Arthur Mueller. I am of opinion that what

(*d*) [1886] 12 V.L.R. 789.

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was done amounted to an ante-nuptial settlement on the wife of anything that was to come from the policy.

There is no doubt that the evidence is meagre. But the death of the husband and wife within about twenty-four hours of one another to a large extent accounts for this. The policy was taken out in the maiden name of his wife, expressed to be in anticipation of a marriage which afterwards took place, and it certainly was afterwards known to the wife, for both husband and wife borrowed money on it. These facts are, I think, sufficient to show the assent of the parties to an ante-nuptial settlement. But it was contended next that, inasmuch as the wife died before the husband, the benefit of the policy came back to the husband as a resulting trust. I feel great difficulty in taking this as serious argument, inasmuch as the consideration of marriage is a good and valuable consideration, and the wife a purchaser for value, thereby displacing any implication of a resulting trust. I am therefore of opinion that the money from this policy is an asset in the estate of Cecile Mueller; is not assets for the payment of the debts of Arthur Mueller, and is the property of the plaintiffs.

The next question was as to who was entitled to the benefit of a policy in the Mutual Life Association issued in 1896, expressed on the face of it to be for the benefit of the wife. The moneys coming from this policy were, it was argued, assets in the estate of the husband, and liable for the payment of his debts. On behalf of the children, it was urged that these moneys were taken from creditors by sec. 14 of the *Married Woman's Property Act* 1890. This policy was issued to and procured by the husband for the benefit of his wife. She predeceased him. The section provides that such a policy shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his debts. The object of the trust in this case was to make provision for the wife. The wife at the time the moneys became payable was dead. The object of the trust was completed, and so far as this objection is concerned Mr. Davis's argument should prevail. But it was

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contended by Mr. Mitchell that, if this section did not prevent this money from going to creditors, sec. 3 of Act 1699 did preserve this money for the children of Arthur Mueller. Counsel who appeared for the creditors strongly and forcibly put the view that this section only protected 1000*l.*; that sub-sec. 1 practically governed all the sub-sections of sec. 3; that sub-sec. 3 of this section was only intended to get rid of, and did only get rid of, certain decisions about the effect of certain language that might appear in the will, but that this sub-section was not intended to protect, and did not protect, more than 1000*l.* And that argument would have been very plausible were it not for the last clause of sub-sec. 3. Sub-sec. 1 of sec. 3 enacts that the property and interest of any person in any policy or policies of assurance on his own life shall not, to the extent of 1000*l.* of the sum assured, be rendered available for the payment of his debts, either in process of execution or in insolvency, except as hereinafter provided, and it was urged that 1000*l.*, and no more, could be protected by sec. 3; that in the sub-section you can only look for limitations of the 1000*l.* protection, and not for extensions of that protection. But I must construe the section so as to give effect, as far as possible, to all the words of the section, and without going further than sub-sec. 2 effect can be given to "except as hereinafter provided" of sub-sec. 1, and though in a scientifically drawn and accurately worded Act of Parliament one might expect after such words to find in that section provisions dealing only with the "exception," yet it would be very dangerous to lay down as an irrebuttable rule of construction that all Acts of Parliament are to be interpreted on the supposition that they have been scientifically drawn and accurately worded, and to apply such a rule in this case would make the construction of sub-sec. 3 impossible. Sub-sec. 3 deals with a particular class of assurances—assurances maturing only at death—and with regard to these it enacts—"That notwithstanding anything contained in his will or any codicil thereto on the death of any person the property and interest of such person in any such policies shall not be assets for the payment of his debts," etc. There is no limitation here of 1000*l.*, nor any reference to the 1000*l.* What is protected is "the property or

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interest of such person," no matter what the amount. Then comes the last clause of this sub-section:—"But if he dies within four years after the date of any policy a portion of the sum paid under such policy equal to the amount of premiums actually paid in respect of so much of the sum assured as exceeds one thousand pounds shall be assets for the payment of his debts."

On the construction which the creditors seek to put upon this section, they would be entitled to receive all the premiums paid in respect of so much of the sum assured as exceeds 1000*l.*, and also the amount received in respect of those premiums. It is impossible to conceive that the Legislature meant to give the creditors both the premiums and also the money those premiums have purchased. I am therefore of opinion that the creditors are not entitled to this money either.

I answer the questions thus:—As to (1), (*a*) they are assets in the estate of Cecile Mueller; (*b*) they are not assets for the payment of the debts of Arthur Mueller; (*c*) they are the property of the plaintiffs. (2) They are assets in the estate of Arthur Mueller, but are not available for payment of his debts; my judgment fully explains the answer to this question. As to question (3), I have not specifically answered that in my judgment. There is no doubt that the policy moneys will be responsible for the payment of probate duty, and the assets should be marshalled for the payment of funeral and testamentary expenses.

His Honor made the following order as to payment of expenses out of the estate:—"Probate duty payable on the estate of A. Mueller in respect of the policy moneys forming part of his estate, and a due proportion of the executors' commission, should be borne by and paid out of such policy moneys, and his funeral and testamentary expenses should also be paid out of such policy moneys in exoneration of the general residue of his estate available for creditors, and that the costs of the plaintiffs and the defendant Gair, when taxed, be paid or retained out of the proceeds of the said policy moneys part of the assets of the estate of A. Mueller and not available for the payment of his creditors, and that the costs of the defendant

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Peterson be paid out of the assets of the estate of A. Mueller other than the said policy moneys."

Solicitors for plaintiff: *Gair.*

Solicitors for the defendant Gair: *Brahe & Gair.*

Solicitors for defendant Peterson and Co.: *J. M. Smith & Emmerton.*

W. H. M.

HOOD, J.
1903
August 18, 19.

[IN CHAMBERS.]

In re X.

Infants—Past maintenance—Breaking into corpus—Special circumstances.

Applications to break into *corpus* for the purpose of past maintenance of infants will be refused unless it be shown that there are some special circumstances explaining why the application was not made before the money was spent, or that the applicant has been compelled by urgency to expend money on maintenance.

In re Welch ([1854] 23 L.J. Ch. 344) followed.

APPLICATION TO BREAK INTO *Corpus.*

This was an application under the *Trusts Act* 1896 by the Secretary of the Department for Neglected Children, as guardian of Y. X., for an order "That the Perpetual Executors and Trustees Association Limited, the administrator of the estate of X., deceased, be at liberty to deduct from the capital of the share of Y. X. such sums as will with the income of such share make up the sum of not more than 15*l.* 12*s.* per annum while the said Y. X. remains a ward of the said department."

From the affidavits it appeared that Y. X. was born on 16th November 1902, and on the 17th day of November 1902 she was, by order of a police magistrate, committed to the care of the Department for Neglected Children. The estate of the deceased consisted of real and personal estate to the value of 1831*l.* 8*s.* 6*d.*, and the said child and the four other children of the deceased were solely entitled to share in the distribution of the estate. The share of the said child was estimated at about 250*l.*, and at

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the date of the application there was a balance of cash in the hands of the administrator of about 275*l.* It also appeared that on 8th April 1903 the Chief Justice had made an order that the administrator should pay the sum of 15*l.* 12*s.* per annum for the maintenance and clothing of each of the other four children until he or she should attain the age of 15 years.

Nothing had up to the date of this application been paid to the applicant for the maintenance of the said child. The administrator consented to the application.

Dethridge, in support of the application, asked that the allowance should be made so as to cover past maintenance.

He referred to sec. 19 of the *Trusts Act* 1896 and *In re Symons* (*a*).

Cur. adv. vult.

August 19,

HOOD, J. Application was made to me to break into the *corpus* of money belonging to an infant both for past and for future maintenance. I granted the application as to future maintenance, but I reserved my decision as to past maintenance. On looking into the authorities I find that such applications have been frequently refused and frequently granted. In the case of *Re Orton* (*b*), a decision of Webb, J., the learned Judge, in refusing the application, appeared to be of opinion that such applications should never be granted, but, on the other hand, they have been granted without comment. I think the true principle is to be found in *In re Welch* (*c*)—namely, that these applications for past maintenance should be refused as a general rule; but that when special circumstances are shown explaining why the application has not been made before, or where the applicant has been compelled by urgency to spend money, the Court has a discretion to grant the application and will grant it. To rule otherwise, and to grant these applications as a matter of course, would encourage people having control of the property of children to spend that money without application to the Court, and perhaps deprive the child of the benefit of it. In

(*a*) [1899] 24 V.L.R. 664. (*b*) [1888] 14 V.L.R. 190.
(*c*) 23 L.J. Ch. 34.

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the present case there are no special circumstances, and therefore the application will be refused. I should have great doubt as to granting the application at all, having regard to the fact that the child is in the custody of the Neglected Children's Department, and therefore entitled to support, had it not been that similar applications had been granted before with respect to other members of the family.

Order accordingly.

Solicitor for the applicant: *Guinness,* Crown Solicitor.

J. M.

A'BECKETT, J.
1903
May, June 15.

CAROLIN *v.* CURNOW.

Mandamus—Public document in possession of mayor—Request by councillor to produce—Right to production—Local Government Act 1890, *ss.* 10, 75, 76, 182, 191, *and Schedule XIII.*

The issue of the prerogative writ of *mandamus* will be restricted to cases where justice would otherwise fail, or where some real interest of the applicant is involved, and might suffer if the writ were refused. It will not be granted merely in order to decide some question of abstract right.

A requisition for the use of the Town Hall was addressed to the mayor of a city. Subsequently, at a meeting of the council, the conduct of X., a councillor, in publicly making certain charges against the mayor, was under discussion. X. stated that he blamed the mayor for treating the requisition as his own private property, and called upon him to produce it. The mayor refused to do so. The subject of the requisition was not otherwise before the meeting of the council in question. X. having obtained a rule *nisi* for a *mandamus* to compel him to produce the document,

Held, that as there was no business before the meeting to which the requisition was in any way relevant, X. was not entitled to its production.

APPLICATION FOR WRIT OF *Mandamus.*

This was a rule *nisi,* obtained on the application of John Pend Carolin, a member of the Council of the City of Bendigo, ordering John Henry Curnow, the mayor of the said city, to show cause why a prerogative writ of *mandamus* should not be issued calling upon Curnow to produce to Carolin, and to place in the custody of the proper officer of the said council, a requisition or request signed by certain ratepayers of the said

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ing the said Curnow, as mayor of the said city, to
n citizens thereof the use of the Town Hall free of

s are set out in the judgment of A'Beckett, J.
eturn of the rule,

.C. (with him *Gaunt*) to show cause—The corpora-
have been made a party. It may well be that the
could show reasons why the document in question
be produced. Even assuming the parties are right,
s show no case for a *mandamus*. There was no
which this document was relevant before the
which production of it was demanded and refused.
at most a general discussion, in course of which
as made to the document, but there was no motion
efore the meeting which rendered its production

ETT, J. That is not the ground taken at the time.
says—"It is my private document, and I have a
p it to myself."]
ontention is correct, there is no need to go that far.
to have been a formal motion.
ETT, J. What do you suggest the motion ought to
There is an application made with reference to the
corporation property. Before Carolin brings any
vard he may wish to see the document for the
his motion. As a matter simply of common-sense
it seems irrational that the mayor should have
ercise a discretion, assuming that he has it, without
ny member of the council.]
be impossible to carry on municipal business if any
the council could get up at any time and say,
h and such a document." Even though the reasons
efusing to produce were wrong, the applicant here
d on the strength of his own case—he must show
titled to production. If we have good grounds for
produce they will be a sufficient answer here though
fferent and untenable reasons at the time. The

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applicant cannot come to the Court and get a declaration that the position taken up by the mayor was wrong. The Court will not make a "declaratory *mandamus*." Before the applicant can come to the Court he must put himself into the position that he has been actually barred of his right. The application of the writ is limited to some legitimate and proper object in which the party has an interest: *Rex* v. *Master and Wardens of Merchant Tailors' Company* (*a*); *Ex parte Briggs* (*b*); *Reg.* v. *Churchwardens of All Saints* (*c*); *Reg.* v. *Cheyne* (*d*); *Rex* v. *Clear* (*e*); *Reg.* v. *Lewisham Union* (*f*).

They also referred to *Local Government Act* 1890, secs. 75, 76, Schedule XIII., paragraphs 6 and 7.

Cussen (with him *Winnecke*) to move the rule absolute—No act can be done on behalf of a municipality, or with reference to its public buildings, except by the council. The council has power to appoint committees. The only possible justification of the mayor and town clerk treating themselves as owners of the Town Hall for twelve months is that they or the mayor may be a committee. Even in that case they must report to the council. Secs. 10, 182, and sec. 191, sub-sec. 5, all show that all questions relating to public meetings are questions to be ultimately dealt with by the council. The same thing is shown by Schedule XIII., "Proceedings," r. 3, and clauses 21 and 28 of Part III. of that schedule. Clause 28 does not cover the whole ground with regard to the production of documents. If the document was a relevant document that is an end of the matter. But even if it is not relevant, it is submitted that any councillor has a right to ask for the production of any public document. Broadly, the position is that any person having an interest in a public matter can call on any person having in his possession a document which the first person has a right to see to produce it. In particular a councillor is entitled to say, "I am going into the whole question of this municipality—its present position—the manner in which its business is conducted and has been con-

(*a*) [1831] 2 B. & Ad. 115.
(*b*) [1859] 1 E. & E. 881.
(*c*) [1876] 1 App. Cas. 611.
(*d*) [1900] A.C. 622.
(*e*) [1825] 4 B. & C. 899.
(*f*) [1897] 1 Q.B. 498.

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ducted in the past. For that purpose I want all or a great number of the documents of the municipality produced." The Court might limit that right if it thought the business of the municipality or council would be thereby blocked, but subject to that a councillor would have the right to see every public document in the possession of the mayor or council, though not necessarily at one and the same time. As to the objection that the corporation is not a party, our complaint is that the corporation has not this document—that the mayor is keeping it as his private property. That being so, it would be absurd to call upon the corporation to produce it: *High on Extraordinary Remedies*, sec. 311. In the *Merchant Tailors' Case* it was not a councillor or anyone in a corresponding position who asked for production. Moreover, in that case they asked for the production of all the documents without specifying what particular documents they wanted. So in *Rex* v. *Clear* the corporation was not made a party. The decision there turns upon the particular Statute. (They also referred to *Rex.* v. *Tower* (*g*); *Rex* v. *Guardians, etc., of Great Faringdon* (*h*); *Rex* v. *Justices of Staffordshire* (*i*).) It is true the Court has a discretion in applications for the prerogative writ, but if there is a clear right, as there is here, the only cases where the Court has refused this remedy have generally been where the applicant has some other remedy. Where the applicant is a person holding a public position his motives will not be so closely scrutinized as in the case of a private individual. Here there is no other remedy. *Reg* v. *Huntley Shire, etc., Ex parte Tootell* (*k*) shows that, without notice of motion, if all the councillors are present at a meeting, they can raise and deal with any question except matters involving the expenditure of money. *Rex* v. *Barker* (*l*) shows that the importance or value of the matter in issue is not scrupulously weighed by the Court.

Cur. adv. vult.

June 15.

A'BECKETT, J., read the following judgment:—These proceedings have originated from an application made to Mr. John

(*g*) [1815] 4 M. & S. 162.
(*h*) [1829] 9 B. & C. 541.
(*i*) [1837] 6 Ad. & E. 84, at p. 99.
(*k*) [1887] 13 V.L.R. 606.
(*l*) [1762] 3 Burr. 1268.

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Henry Curnow, mayor of Bendigo, about the 19th of last. It was in writing, signed by certain ratepayers. Its terms do not appear in the affidavits, but it was a request mayor to convene a meeting in the Town Hall, at which h asked to preside, to hear a lecture on "Social Science" b Tom Mann. It was in effect an application for the use Town Hall free of charge. Mr. Mann is a paid agitator, views are not acceptable to all classes. The town clerk r that His Worship regretted that the request could not be plied with, but that the hall would be available for Mr. under the usual conditions. It was taken on those condi 2*l.* 10*s.* was paid, and the lecture was delivered on the 23 March. Here the matter apparently ended. So far a affidavits disclose, nothing further was heard of it until i mentioned at a meeting of the Council on the 3rd of Ap take the facts as to what then occurred from the news reports, which Mr. Carolin refers to in his affidavit as reaso fair and accurate. From them I gather that Mr. Carolin, a town councillor, had on the 2nd of April addressed a meeting, making a number of charges of misconduct an honesty against the mayor and his brother councillors, an the mayor and other councillors referred to these utter denying their truth, and that, after a discussion, which the papers describes as a long wrangle, a motion was car "That this Council regrets that, notwithstanding the whelming evidence of the absolute untruthfulness of Cou Carolin's statements, he still acts in a mean and contem manner by repeating these falsehoods." Councillor Caroli the only dissentient. In the course of the discussion a insignificant incident occurred amongst the graver charges were its staple—Cr. Carolin said that he blamed the may regarding the requisition presented to him in respect to Mr Mann's meeting as his private property. He had never that requisition. The mayor denied his right to see it refused to show it. On the 7th of April Mr. Carolin's soli wrote to the mayor stating that they had been consulted v view of taking legal proceedings to enforce his right to pr tion of the document. That it was not desired to take a

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tage of words possibly uttered in the heat of temper, and that if they heard from him that he was prepared to produce the document to Mr. Carolin at the next Council meeting, and to pay their costs, their client would be satisfied, but that in the alternative they would regretfully be compelled to institute legal proceedings. No answer was sent to this letter, and legal proceedings were instituted by obtaining an order *nisi* calling on the mayor to show cause why he should not produce the document to Mr. Carolin at the meeting of the Council next succeeding the day on which the order should be made absolute. In answer to the application, and in reply, several affidavits have been filed.

I pass over references to the insulting manner in which the demand was made in the Council Chamber, and to other and more serious differences between Mr. Carolin and his brother councillors, and confine myself to the rights asserted as to the document. It appears that it was not laid before the Council, and that the question as to whether or not the free use of the hall should be granted was not brought officially before it. The mayor says that he is advised and believes that the request—*i.e.*, the document—"was and is my private property, and that the granting and refusing of such a request is within my own personal rights and privileges, and that, in accordance with the custom of my predecessors in the office of mayor, similar applications are not brought before the councillors for their deliberation." Three of these predecessors and the town clerk make affidavits confirming his statement as to past usage. As against this, the mayor of South Melbourne, and a present councillor and past president of the Shire of Malvern, say that they have always treated requisitions for the use of the Town Hall as documents the property of the Council. The applicant also makes an affidavit in contradiction. The document in question, so far as it requested the mayor to preside, was manifestly a private document, which he could properly have answered without any reference to the Council, but in so far as it requested the use of the Town Hall it related to a matter which the Council had the right to say should be decided by them. Although a municipal council may have tacitly

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sanctioned a usage by which the mayor is left to deal with such matters informally, applications for the hall relate to the use of municipal property, which the Council has the right to decide upon. If the requisition in question here had been made the subject of discussion in the Council by the mayor voluntarily, or by any councillor adversely before it had been answered, and the question of whether it should be granted or not came legitimately under discussion, the mayor's refusal to produce the document would have been decidedly wrong. I think that a councillor, to whom production was thus refused, would have a right to a *mandamus*. He might have a difficulty in obtaining it in time to be of use, and this might be a bar to his obtaining it, but I should say that, in the abstract, the right would exist. The circumstances here are altogether different. No business relating to the requisition was before the Council when production was asked for. No business relating to it could now, by any proper proceeding, be brought before the Council. Further discussion in the Council in relation to this document would be not only profitless but mischievous, by obstructing the proper business of the Council. It might be right enough to bring on for discussion the proper course to be observed in the future with regard to applications for the use of the hall, but it is clear that the production of the document would be quite unnecessary for the purpose of such a discussion. No purpose has been mentioned which would be served by its production. This objection to Mr. Carolin's application has not been overlooked by the advisers who prepared his affidavits. He swears that he is anxious to establish the right of councillors to determine questions of the character raised by the requisition; that in order to properly discharge his duty he desires to inspect the requisition, and that he is desirous of inspecting the said requisition as he contemplates taking further action as a councillor in respect thereto. He does not say what action, and it is hard to conceive any which would not be prejudicial, by reviving acrimonious discussion on a matter long since disposed of. An order directing the mayor to produce the paper to Mr. Carolin would not be of any use to Mr. Carolin in the discharge of any of his duties as councillor. His object is clearly vexatious,

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to compel the mayor to produce something which he wishes to see only because the mayor does not wish him to see it. In *Rex* v. *The Merchant Tailors' Company* (*m*) it was decided that the Court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of the corporation unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested. *Tapping on Mandamus*, at pp. 15 and 16, cites authorities to show that in the words of the text-writer the Court will refuse the writ if it be manifest that it must be "useless," or "cannot have a beneficial effect," "if it be vexatious," or it is sought merely in order to obtain the opinion of the Court on a point of law. I have examined these authorities, and do not say that severally they are indistinguishable from the present case, but they all show a tendency to restrict the issue of the writ to cases where justice would otherwise fail, where some real interest of the applicant is involved, and might suffer if the writ were refused. Consistently with all the authorities, I think I should refuse the *mandamus* in this case. A paltry dispute has been inflamed into a matter of importance by recourse to the Supreme Court. Using the words of Lord Tenterden in the *Merchant Tailors' Case*, I say—"The rule must be discharged, with costs, because where parties make an entirely novel application, in which they fail, they ought to pay the expense of it."

Rule discharged.

Solicitor for the applicant: *Cornwall.*
Solicitor for the respondent: *Rymer.*

J. M.

(*m*) 2 B. & A., p. 115.

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June 19, 20,
July 21.

BROSNAN *v.* TRAIT *and Others.*

Friendly Societies Act 1890 (*No.* 1094), *ss.* 4, 5, 13, 20—*Friendly Societies Act* 1891 (*No.* 1232), *s.* 12—*Rules and amendments informally made—Effect of registration of—Dispute between member and society—Jurisdiction of Supreme Court—Parties—Non-joinder of.*

The acknowledgment of registry of an amendment of a rule of a friendly society, issued under sec. 13 (5) of *The Friendly Societies Act* 1890, is conclusive evidence that such amendment has been duly made, as well as that it has been duly registered.

A provision in the rules of a friendly society that "all disputes between a member or person claiming through a member or under the rules of the society and the society or any officer thereof shall be decided by" the governing body of the society does not oust the jurisdiction of the Supreme Court in an action by a member in which the complaint is that the defendants, acting under certain amended rules purporting to have been made by the society, but which the plaintiff alleges to have been illegally made, have usurped the control of the business, funds, and property of the society.

In such an action, as the society may be interested in maintaining the validity of the amended rules, it or someone representing it should be joined either as a plaintiff or defendant.

POINTS OF LAW set down for hearing before trial.

This was an action in which Patrick Brosnan (on behalf of himself and all other members of the Hibernian Australasian Catholic Benefit Society except the defendants) claimed—(*a*) A declaration that certain amendments of its rules or "general laws" alleged to have been adopted by the society on the 16th April 1901, and to have been registered under the *Friendly Societies Act* 1890, were invalid and not binding on the society or its members. (*b*) An injunction restraining the defendants (who were members of the "District Board" mentioned below and acted as the chief executive committee of the society) from administering the funds and property and business of the society, and from acting in pursuance of the alleged rules or of any rules made thereunder. The objects of the society were to raise a fund for aiding distressed or sick members and the widows and families of deceased members, etc. It had been registered under the *Friendly Societies Act* 1877 as from 1st January, 1878. The statement of claim alleged that on 7th June 1901 a document purporting to contain a copy of amendments of the then existing rules (called "general laws") of the

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society was registered under the *Friendly Societies Act* 1890 as amendments of the said rules, the amendments purporting to have been adopted by the society at a meeting on 16th April 1901; that the alleged amendments were not in fact made by the society under any power conferred by the then existing rules of the society or under its constitution. That the alleged amendments purported "to change fundamentally the constitution of the society and to vest jurisdiction over all matters appertaining to the society in the Melbourne District Meeting, which is to be the supreme tribunal in Victoria and to have the sole right and power to grant and cancel dispensations to branches in Victoria, to make, alter, or repeal rules for the society, to strike levies on members, to hear and finally determine appeals, to redress grievances in branches, to decide questions arising on the constitution of the society and the rules, but during the intervals between District Meetings the whole of the powers of the District Meeting (except amendment of laws and adjudicating on appeals from District Board decisions) is to be vested in the Melbourne District Board;" that the defendants were carrying out the duties and powers purported to be conferred upon them by the said amendments, and refused to recognize the rules as they existed prior to June 1901 as binding upon them or the society; and that the "District Meeting" under the alleged amendments was composed of the members of the "District Board" and other persons.

Various defences were raised. Those relevant to this report were as follow:—

Paragraph 9: "The defendants will rely on the provisions of sec. 20 of the *Friendly Societies Act* 1890, sec. 12 of the *Friendly Societies Act* 1891, rule 47 of the original rules, and rule 76 of the alleged amended rules, and will contend that this Court has no jurisdiction to hear and determine the matters in dispute in this action."

Paragraph 10: "The amendments referred to in the statement of claim having been registered by the Registrar of Friendly Societies, who has given an acknowledgment of the registering of the same, the defendants will rely on sec. 13 of the *Friendly Societies Act* 1890 and contend that such

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amendments must be deemed to have been duly made and registered."

Paragraph 11: "The plaintiff, purporting to sue on behalf of himself and other members against the defendants as individuals or as members of the District Board, is not entitled to any of the relief claimed in this action, and such relief can only be claimed by or on behalf of the society."

Rule 47 (8) of the original rules read—"All disputes between a member or person claiming through a member or under the rules of the society or any Branch thereof and the society or Branch or any officer thereof, not hereinbefore provided for, shall be decided by the Executive Directory." Rule 32 (5) of the amended rules reproduced this rule, but substituted for the words "by the Executive Directory" the words by the District Board, subject to appeal to the District Meeting."

By consent an order was made by a judge in Chambers that "the points of law raised by paragraphs 9, 10, and 11 of the defence herein be set down for hearing before the Court and disposed of before the trial . . . . and that the Court be at liberty to consider all the original rules and the alleged amended rules."

Cussen (with him *Eagleson*) for the defendant—The defence raised by paragraph 9 is that this is a "dispute" within rule 47 (8). If that be so, that rule provides the only method of dealing with it. Sec. 20 of the *Friendly Societies Act* 1890 and sec. 12 of the Act of 1891 provide that such disputes are to be decided in manner directed by the rules of the society, and the decision is to be binding and not removable into a court of law: *Kingham* v. *Joel* (a). Where there is no provision in the rules applicable to the particular dispute, the member or person aggrieved may apply to either the County Court or two justices. But this Court has no jurisdiction. The acknowledgment of the Registrar is conclusive not merely of the fact of registration but also that the rules registered are actually the rules of the society: *Dewhurst* v. *Clarkson* (b); *Rosenberg* v. *Northumberland Build-*

(a) [1897] 23 V.L.R. 284. (b) [1854] 3 E. & Bl. 194.

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ing Society (c); *Laing* v. *Reed* (d); *Lindley on Companies* (6th ed.), vol. i., pp. 151, 162. Either the society or someone claiming on its behalf is a necessary party to this action: *Falconer* v. *Weedow* (e).

Higgins for the plaintiff—Sec. 13 of the *Friendly Societies Act* 1890 makes the acknowledgment of the Registrar conclusive evidence of nothing else than the fact of registration. It is not evidence that the rules were made by the society.

[HOLROYD, J. Is that not evidence that these rules were amendments of the rules which were registered?]

I submit it is evidence of registration only. The Registrar has not the means of finding out whether the rules presented to him are in fact the rules duly passed by the society. The Act gives him no power to administer oaths, nor does it contain any provision that the rules when registered "shall be binding." It differs therein from the Acts on which the cases cited were decided. They are distinguished in *Souter* v. *Davies* (f). If the argument for the defendants be sound, then registration, procured by fraud on the Registrar, of rules which had never been presented to the society would close the mouths of members, and be conclusive evidence that those rules had been duly made. Even the *Transfer of Land Act*, which goes further than any other Statute in closing the mouths of parties to the true facts, does not go that far: *Gibbs* v. *Messer* (g). As to rule 47, in the first place there is no longer any Executive Directory, and in the second there is here no dispute between a member and the society or an officer thereof. That rule will not be applied so as to make a party a judge in his own cause: *Cheetham* v. *Elliott* (h). The rule does not exclude the jurisdiction of the Supreme Court: *Re Royal Liver Society* (i); *Tiplady* v. *Royal Liver Society* (k). As to the objection taken to the form of the action and parties, the long series of cases which show that a company incorporated must sue for an injury done to it do not

(c) [1889] 22 Q.B.D. 373.
(d) [1869] L.R. 5 Ch. 4.
(e) [1888] 14 V.L.R. 846.
(f) [1895] 15 R. 261.
(g) [1891] A.C. 248.
(h) [1886] 12 V.L.R. 370.
(i) [1887] 35 Ch. D. 332.
(k) [1887] 3 *Times* L.R. 697.

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apply to a club or unincorporated body like this society. This is practically a partnership dispute and a suit between partners. Suppose you have a partnership of nineteen members. Eighteen of them may bring an action against the nineteenth. The power given in the "Judicature Rules" for suing in the partnership name does not apply to an internal dispute: *Gray* v. *Lewis* (*l*); *Henderson* v. *Bank of Australasia* (*m*).

He also referred to *Falconer* v. *Weedow* (*n*); *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (*o*); *Kingham* v. *Joel* (*p*); *Mosely* v. *Alston* (*q*); *Fawcett* v. *Harbottle* (*r*).

Cur. adv. vult.

July 21.

HOLROYD, J., read the following judgment:—I have at present to dispose of the points of law raised by paragraph 9 of the defence, excluding the words "which are in fact disputes between a member and the society, or between a member and officers of the society," and by paragraphs 10 and 11 respectively. To take these points in the order in which they were argued, the first is, that the amendments of rules referred to in the statement of claim having been registered by the Registrar of Friendly Societies, who has given an acknowledgment of the registering of the same, such amendments must be deemed to have been duly made and registered, and in support of this contention sec. 13 of the *Friendly Societies Act* 1890 is relied upon. By the first sub-section of sec. 13 it is enacted that the rules of every society sent for registry shall contain provisions in respect of the several matters mentioned in the Second Schedule to the Act, which comprises amongst others the manner of making, altering, or rescinding rules. Sub-sec. 2 enacts that no amendment of a rule shall be valid until the same has been registered, for which purpose copies of the same, signed by three members and the secretary, are to be sent to the Registrar. Sub-sec. 3 directs that on the lodgment with the Registrar of any amendment of

(*l*) [1873] L.R. 8 Ch. 1050.
(*m*) [1890] 45 Ch. D. 330.
(*n*) 14 V.L.R. 846.
(*o*) [1901] A.C. 426, at p. 430.
(*p*) 23 V.L.R. 284.
(*q*) 1 Ph. 790.
(*r*) [1843] 2 Hare 461.

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rules for registration there shall be paid to the Registrar a fee of 10*s*., and that the Registrar shall not do anything in respect of the registration of such amendment until such fee has been paid. Sub-sec. 5 enacts that the Registrar shall, on being satisfied that any amendment of a rule is not contrary to the provisions of the Act, issue to the society an acknowledgment of registry of the same, which shall be conclusive evidence that the same *is* duly registered. By virtue of sub-secs. 6 and 7, a copy of the rules of a registered society is to be delivered to every person on demand, on payment of a sum not exceeding one shilling; and any person who, with intent to mislead or defraud, gives to any other person a copy of any rules other than the rules for the time being registered under the Act on the pretence that the same are existing rules of a registered society is to be deemed guilty of a misdemeanour. The form of acknowledgment of registry of an amendment of the rules is a simple declaration under the hand of the Registrar that the amendment is registered under the Act: See sec. 30 and Schedule 5. By the combined effect of sec. 39 and the 8th Schedule the certificate, which by that section the Registrar is required to give, so far as it relates to rules or extracts from rules of any friendly society, must in all Courts be held conclusive evidence that such rules or extracts were registered in accordance with the provisions of the *Friendly Societies Acts* on a particular day. The natural interpretation of such a certificate is that the legal requisites to the registration of such rules or extracts, such for instance as the payment of fees, the presentation of the rules to the Registrar signed by three members and the secretary, and so on, were duly performed on that day. Mr. Higgins admitted that the society would have had power to make the amendments complained of in this action if it had proceeded in the manner prescribed by the then existing rules or by the constitution of the society, which it had not done. Mr. Cussen insisted that the acknowledgment of registry of these amendments was conclusive evidence, not only that the provisions relating to registration had been complied with, but that the power to amend had been strictly pursued.

The validity of rules or amendments of rules begins with

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their registration; but the Registrar is not required, n
express terms authorized, to inquire whether any rul
amendments presented to him were passed in accordance
the Acts or in the manner prescribed by the then existing
He has nothing but the fact of their having been signed by
members and the secretary to assure him that they w
passed. He has no affidavit or written document befor
affirming the validity of their making. On the other ha
was not prohibited from investigation; and it is diffic
understand for what the signatures were wanted, except
voucher that the rules or amendments came regularly
existence, or perhaps as affording means for inquiry, if the
anything suspicious about their origin. In the same wa
only of the legality of the contents of an amendment th
Registrar is in terms bound to satisfy himself before issui
acknowledgment of the registry thereof, and his ackno
ment is only conclusive of the fact that the amendm
registered as it ought to have been according to law
revanche it seems to me to be clearly assumed in sub-secs.
7 of sec. 13, that the only existing rules of a registered fr
society are the written or printed documents for the time
registered as rules under the Act. In this predicament
glad to fall back on authorities which, though not alto
satisfactory, show the trend of judicial opinion in Englan
this matter. In the case of *Dewhurst* v. *Clarkson* (s), c
under the Statute 4 & 5 Will. IV., c. 40, sec. 4, an amen
of rules, irregularly made, but which had been certified
certifying barrister as in conformity to law, was held val
so much because of his certificate as of those form
prescribed by the Act which had been complied with
obedience to sec. 4, two transcripts, signed by three m
and by the secretary, and accompanied by an affidavit t
making the amendments the statutory requirements a
regulations had been duly observed, were submitted
barrister in due course. Sec. 4 provided that rules and a
ments thereof, from the time when certified by him, sho
binding on the several members and officers of the societ

(s) 3 El. & Bl. 194.

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all other persons having an interest therein. The judgment was delivered by Lord Campbell, C.J., Coleridge and Whiteman, JJ., concurring, and Erle, J., dissenting. Lord Campbell said that, but for the words "from the time when the same shall be certified by the barrister," he should have thought it clear that the rules were to be absolutely binding. The great difference between that case and this was that, under the Act of William IV., the amendments, when transmitted to the barrister, were accompanied by the affidavit; but it certainly seems most probable that if, as happens here, an affidavit had not been required, their Lordships would have considered the signatures of the three members and the secretary as a sufficient guarantee. Lord Campbell proceeds with his judgment thus—The barrister is not "to inquire into the regularity of the making of the rules. . . . Those who think that the rules were irregularly made are not furnished with any means of raising the question. In very rare instances this may produce some inconvenience; but faith may generally be given to the signature and affidavit required as preliminaries, and probably much more inconvenience would arise if, after the rules had been certified and confirmed and acted upon, it were competent to any refractory member at any distance of time to object that the proper notices were not given of the meeting at which they were agreed to, or that there were not a sufficient number of members present at this meeting, or that upon a division the votes on each side were not properly counted. If, notwithstanding the precautions taken, any rule has been certified by the barrister which was not regularly made, a remedy would be open to a member who disapproves of it by moving its repeal or modification, and, if there be a majority of the society who agree with him, the wrong would be redressed. The defendant's counsel admit that the certified rule is *primâ facie* valid; but great mischief might arise if this were only a presumption to be rebutted, as then in every case where a rule is to be enforced . . . . evidence might without notice be given of some alleged irregularity in making it." See also *Rosenberg* v. *Northumberland Building Society* (*t*), English *Building*

(*t*) 22 Q.B.D. 373.

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Societies Act 1874, secs. 18, 20, and 21; *Souter* v. *Davies* (*u*). The passage just quoted is very apposite and forcible as to the convenience of protecting registered rules from challenge; and although no notion of convenience should overweigh plain words, yet, where the meaning hangs in doubt, that may well turn the scale. I decide therefore that the amendments referred to in the statement of claim must be deemed to have been duly made as well as duly registered, and to be valid and binding upon all the members of the society.

Passing to the 9th paragraph of the defence, the matters in dispute therein mentioned are not in my opinion disputes within the meaning of the original rule 47. The complaint in this action is substantially that the defendants have usurped the control of the funds, property, and business of the society, acting under certain so-called amended rules or general laws, purporting to have been adopted by the society at a meeting on the 16th of April 1901, but which were in fact illegally made. I think this Court has jurisdiction to hear a complaint of that kind, and to redress the grievance complained of, if the allegations are proved, although any evidence adduced by the plaintiff would be utterly nullified upon production of the Registrar's acknowledgment.

As to paragraph 11 of the defence, I do not concur with the defendant's contention that all the relief claimed in this action could only be claimed by or on behalf of the society; but I think that, as the amended rules purport to have been adopted by the society, the society is or at any rate may be interested in maintaining their validity, and that the society or someone as representing the society ought to have been joined either as plaintiff or defendant. The statement of claim does not show how or by whom the amended rules were passed. A large majority of the members may have voted for them, and the plaintiff may not be qualified to sue on behalf of all the other members except the defendants. The defendants themselves may possibly have taken no part in procuring their adoption.

(*u*) 15 R. 261, per Wills, J., distinguishing *Dewhurst* v. *Clarkson* and the case last cited.

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The trustees also may be interested parties. The plaintiff must pay the defendants' costs of this hearing.

Solicitor for the plaintiff: *M. C. Larkin.*
Solicitors for the defendants: *Gaunson & Lonie.*

J. M.

MELBOURNE AND METROPOLITAN BOARD OF WORKS *v.* SPENCER *and Another.*

F.C.
1903
August 10, 11.

Sewerage rates—Melbourne and Metropolitan Board of Works Act 1890 (*No.* 1197), *Part IV.—Id.* 1897 (*No.* 1491), *secs.* 8, 9, 11, 12—"*Valuation in force*"—*Municipal valuation a condition precedent to rate—Local Government Act* 1890 (*No.* 1112), *s.* 274—*Melbourne Corporation Act* (6 *Vict.*, *No.* 7), *ss.* 67, *etc.*—27 *Vict.* (*No.* 178), *ss.* 41-44—*Amendment of municipal valuation—Notice of appeal against valuation—Effect of abandonment of claim to rate.*

The provision of sec. 8 (5) of the *Melbourne and Metropolitan Board of Works Act* 1897, that for the purpose of making any rate the Board shall adopt as the net annual value of the properties the municipal valuation in force at the time of making the rate, makes the existence of a valuation binding upon the ratepayer of any property sought to be rated a condition precedent to the rating of such property by the Board.

Where a municipal council claiming to rate certain property makes a valuation of such property, and, after the owner has duly given notice of appeal against such valuation, abandons the claim to rate the property, such abandonment has the effect of an adjudication by the Court to which the appeal is made reducing the valuation of the property to *nil.*

So held by the Full Court (A'BECKETT and HOOD, JJ., HOLROYD, J., *dubitante*), affirming the decision of HODGES, J. (*supra*, p. 62).

Per HOOD, J. Where notice of appeal against a municipal valuation has been given the valuation is not a "valuation in force" until the appeal has been decided, or where no notice of appeal has been given until the time for appealing has expired.

APPEAL.

This was an appeal from the decision of Hodges, J., reported p. 62 *supra*, where the facts are set out.

Isaacs, K.C., and *Starke* for the appellants—There was a valuation of this property in 1901, and that valuation has never been altered, and has been continuously in force to the present time.

[HOOD, J. The valuation must be a valuation on which the municipal council can rely. They abandoned their valuation.]

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At the most it would be a case of estoppel, and that could only operate *inter partes*. As a fact it was not Spencer but the University that appealed. Though the notice of appeal was in form against the valuation as being too high as well as on the ground that the property was exempt, the settlement arrived at was only that the property was exempt. Suppose the appeal had been actually heard, and the Court had decided that the valuation was correct, but that the property was exempt, could that affect the valuation? It would still be a valuation in force. In any case the notice of abandonment was given after the Board had actually made the first rate, so that at the time of making that rate this valuation was in force, even if the abandonment afterwards nullified it. It is possible that at the time the rate is struck by the City Council the property might be exempt, while at the time the rate is struck by the Board circumstances may have changed so that it might not be exempt. But the valuation, being made, continues in force until it is altered.

[HOOD, J. I should think the City Council must make an assessment each year. They need not actually compute the value of each property each year, but they must at least formally adopt the assessment of last year.

A'BECKETT, J. The assessment must be an annual thing. Here the Council abandoned it for one year; they did not claim the next year, and therefore there was no assessment for that next year.]

They did not abandon it as a valuation; they only admitted the property to be exempt.

[HOOD, J. The ratepayer has no machinery for fighting the Board. The intention must have been that the matter is to be fought out between the ratepayer and the council.]

The case of *Attorney-General* v. *Shire of Hampden* (a) shows that power to alter a valuation lies in the Court of Appeal only.

[*Mitchell* referred to *Prahran* v. *Carter* (b).]

The principle of sec. 8 is that the Board may rate any property that is rateable by the municipality, and for the

(a) [1876] 2 V.L.R. (E.) 138. (b) [1889] 15 V.L.R. 228, at p. 233.

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purposes of its valuation it may go to the municipal rate books. But no agreement or admission by the municipality that a particular property is not rateable can debar the Board from rating it if as a matter of law it is rateable municipally. The doctrine of estoppel cannot apply to an Act of Parliament: *Barrow's Case* (c). Again, sec. 8 (6) shows the property on which the rate is to be levied. Two sets of property are by that sub-sec. indicated as the property on the net annual value of which the Board is to make its rate—namely, sewered property and unsewered property. The effect of the defendant's contention is to read in the words "of which the municipality has made an assessment or valuation." If the Legislature had intended that the rate was to be on the net annual value only of property which had been valued or rated by the municipality it could have easily said so, as it has done in other Acts. Sec. 8 (5) is a provision for enabling the Board to make its estimate. It goes to the municipal rolls to ascertain the total value of rateable property in order to determine what rate it will strike. The property exempted from rates by the Board is defined in sec. 130 of Act No. 1197. Those exemptions are cut down by sec. 7 of No. 1491. It would seem unnecessary to specifically set out these exemptions if the Board is confined to the property assessed and rated by the municipality.

Mitchell (with him *Lewers*)—"Valuation in force" means a valuation in respect of which a valid municipal rate is then existing. Under the *City of Melbourne Act* there is not, as under the *Local Government Acts*, any necessity to give notice of valuation. The ratepayer knows nothing of the valuation, and so cannot appeal against it until he gets notice of the rate: *Vide* sec. 46 of 27 Vict. (No. 178)." *Roebuck* v. *Geelong West* (d) shows that in connection with the *Local Government Acts* a man cannot be made liable pecuniarily without being heard. There is here really a *casus omissus*.

(He was stopped by the Court.)

HOLROYD, J. The majority of the Court is satisfied that the judgment of Hodges, J., is correct.

(c) [1880] 14 Ch. D. 432, at p. 441. (d) [1876] 2 V.L.R. (L.) 189.

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HOOD, J. By sec. 8 of Act No. 1491 a valuation is a condition precedent to the making of a rate, and that valuation must be a valuation in force. The meaning I attach to that is that a valuation in force means a valuation binding upon the ratepayer. The valuation in the first instance is merely an estimate by the corporation of the value of the rateable property. That is not communicated to the ratepayer. He has no means of challenging it, and not until the rate is made has he power to appeal against it. The valuation therefore cannot be in force until the rate is made, and until the time of appealing is passed, if there is no notice of appeal, or, if there is a notice of appeal, until the Court has decided it. Then, as to the power of the corporation to compromise, I agree with the learned primary Judge that it would be a shocking thing if the corporation were bound to fight every appeal.

HOLROYD, J. My doubt arises entirely upon the construction of these words "valuation in force." Upon that I am inclined to adopt the argument of counsel for the plaintiff—namely, that "valuation in force" means an existing valuation.

Isaacs, K.C.—I understand the judgment of the Court to mean that the valuation was not in force for 1901 on account of the compromise. It might be in force for other years.

HOOD, J. I do not think there is any valuation in force at all yet. That valuation was abandoned.

Appeal dismissed.

Solicitors for the plaintiff: *Fink, Best & Hall.*
Solicitors for the defendant: *Nunn, Smith & Jefferson.*

J. M.

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BARKER *v.* HENTY.

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1903
August 3.

Practice—Mode of trial—Jury—"Causes or matters within the cognizance of the Court in its equitable jurisdiction"—Concurrent jurisdiction of equity—Fraud—Fraudulent preference within the meaning of the Insolvency Acts—Declaration in equity—"Rules of the Supreme Court 1884*"—Order XXXVI., rr.* 3, 6, 7 (*a*).

A Court of equity has a concurrent jurisdiction with a Court of law in all cases involving fraud.

The meaning of Order XXXVI., r. 6, of the "Rules of the Supreme Court 1884" is that causes or matters in which a Court of equity had concurrent jurisdiction with a Court of law (as well as those in which it had exclusive jurisdiction) shall be tried without a jury, unless the Court or a Judge thinks fit to otherwise order.

By the indorsement on a writ of summons, a plaintiff claimed "as trustee of the insolvent estate of D., a sum of 1765*l.* for money received by the defendant to the use of the insolvent and his estate," and also claimed "a declaration that the payment of the said sum by D. to the defendant was a fraudulent preference within the meaning of the *Insolvency Acts*, and void as against the plaintiff."

Held, that, by reason of the declaration being claimed, the matter was one "heretofore within the cognizance of the Court in its equitable jurisdiction," within the meaning of Order XXXVI., r. 3.

APPEAL, pursuant to leave granted by Hodges, J., from so much of an order for directions as directed this cause to be tried with a jury.

The indorsement on the writ of summons is fully set out in the judgment of the Court (*infra*).

The ground of appeal material to this report was as follows:—That the learned Judge was wrong in holding that the plaintiff was entitled as of right under Order XXXVI., r. 6, to have this cause tried with a jury.

Higgins, K.C. (with him *Schutt*) for the defendant, appellant—If this decision is right, the "Judicature Rules" have made a jury imperative where it was not imperative before. This case either comes under Order XXXVI., r. 3, or, according to the English decided cases, is one which before the *Judicature Act* could have been tried without a jury without consent, and therefore there is no compulsion under these rules to have a jury. *Cf.* Rule 4 and *The Temple Bar* (*a*). Rule 3 does not say "within the *exclusive* jurisdiction of the Court in its equitable

(*a*) [1885] 11 P.D. 6.

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jurisdiction," but it means that, if a court of equity could theretofore have tried the case, it shall be tried without a jury. Equity has a concurrent jurisdiction with the courts of common law in an action to set aside a fraudulent preference, and, in fact, in all cases involving fraud. Further, even if Rule 3 only applies, like the corresponding English Rule 3, to cases "assigned exclusively to the Chancery Division," then Rule 7 (*a*) applies, and the mode of trial is without a jury, unless the Court or a Judge otherwise orders. The words "in any other cause or matter" in Rule 6 do not mean in any cause or matter other than one in which the mode of trial has been fixed under the previous rules, but have been held to mean in any cause or matter other than those mentioned or referred to in the preceding rules: See *Jenkins* v. *Bushby* (*b*). Equity had concurrent jurisdiction in cases of this nature before the *Judicature Act*. *Cf. Goodman* v. *McCallum* (*c*); *Jacomb* v. *Donovan* (*d*); *Douglass* v. *Simson* (*e*).

[A'BECKETT, J. Is there any instance of a case in Equity without a reconveyance being necessary ?]

Yes, *Bourne* v. *Graham* (*f*). In that case, however, the Judge sent a doubtful question of fact to a jury.

[HOLROYD, J., referred to *Longstaff* v. *Keogh* (*g*), where it was held, following *Ramshire* v. *Bolton* (*h*) and *Hill* v. *Lane* (*i*), that courts of equity have concurrent jurisdiction with courts of law as to deceit.]

Counsel also referred to *Timson* v. *Wilson* (*k*).

(He was stopped.)

Bryant for the plaintiff, respondent—Rule 3 refers to cases *usually* tried in the equitable jurisdiction and still tried there. The English rule uses the word "exclusive" jurisdiction, and in that respect differs from the Victorian rule. This is a case of money had and received arising from the fact of the payment

(*b*) [1891] 1 Ch. 484, per Lindley, L.J., at pp. 489, 490.
(*c*) [1861] 1 W. & W. (Eq.) 135.
(*d*) [1864] 1 W.W. & A'B. (E.) 66.
(*e*) [1869] 6 W.W. & A'B. (Eq.) 32.
(*f*) [1856] 2 Jur. (N.S.) 1225.
(*g*) [1877] 3 V.L.R. (Eq.) 175, 183.
(*h*) [1869] L.R. 8 Eq. 294.
(*i*) [1870] L.R. 11 Eq. 215.
(*k*) [1888] 38 Ch.D. 72, 76.

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being avoided by Statute, which was never a case within the cognizance of a court of equity. In the cases cited for the appellant the plaintiff had to go to a court of equity to get a declaration as a preliminary to the avoidance of the deed; but in the case here sec. 71 of the *Insolvency Act* 1890 says that the payment being made in certain circumstances is *ipso facto* void, and there is no need to go to a court of equity. The declaration asked for here is merely an ancillary matter: the jury finds the facts, and the Court then makes a declaration giving effect to their finding. The primary claim is—"Give us back this money, which belongs to the creditors." *Cohen* v. *McGee* (*l*), which was a similar case to this, was tried at common law with a jury. *Cf.* also *Flook* v. *Jones* (*m*). If the Court is going to apply the principle of *Longstaff* v. *Keogh* (*n*), it will be laying down a rule that any case in which equity has concurrent jurisdiction cannot be tried with a jury, and therefore that no case involving fraud can be so tried. Unless the remedy at law was wholly inadequate, equity would never intervene. As to the nature and extent of the exclusive, concurrent, and auxiliary jurisdiction in equity, see *Story's Equity Jurisprudence* (13th ed.), p. 82 *et seq.*; and *Ashburner on the Principles of Equity*, pp. 1–5.

Counsel also referred to *Colt* v. *Woollaston* (*o*); *Fells* v. *Read* (*p*); *Brown* v. *Kimpton* (*q*); and *Butters* v. *Durham Gold Mining Co.* (*r*).

HOLROYD, J., delivered the judgment of the Court [HOLROYD, A'BECKETT, and HOOD, JJ.] This is an appeal from so much of an order of Hodges, J., as directs this action to be tried by a jury. The learned Judge considered that under Order XXXVI., rule 6, he had no option, but was compelled to direct a trial by jury. Personally, I think—and I believe it is the opinion of my brother Judges as well—that a Court of equity has concurrent jurisdiction with a Court of law (as well as having in some cases

(*l*) [1878] 4 V.L.R. (L.) 543.
(*m*) [1826] 4 Bing. 20.
(*n*) 3 V.L.R. (Eq.) 175.
(*o*) [1723] 2 P. Wms. 155, 156.
(*p*) [1796] 3 Ves. Jun. 70.
(*q*) [1852] 19 L.T. C.P. 169.
(*r*) [1885] 11 V.L.R. 375.

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exclusive jurisdiction) in all cases of fraud. If we look at the strict language of Order XXXVI., rule 3, it says that—"Causes or matters heretofore within the cognizance of the Court in its equitable jurisdiction shall be tried by a Judge without a jury *unless* the Court or a Judge shall otherwise order." Now the natural interpretation of that rule is certainly that in cases in which a court of equity had concurrent jurisdiction, as well as those in which it had exclusive jurisdiction, a jury should not be accorded to the plaintiff or defendant on his application, but that the Court or a Judge might order a jury if the Court or a Judge so pleased or so thought fit. If that is the correct construction of Order XXXVI., rule 3, then this action does not come within rule 6.

But there is another reason, I think, why it should not come within rule 6, and that is that the plaintiff himself, assuming him to have had an opportunity of shaping his statement of claim in the form either of an equitable claim or of a common law claim, has chosen for himself which way he will shape it. It has been distinctly, in so many words, laid down that a Court of equity has jurisdiction in cases of fraud where at common law the remedy would have been by an action for money had and received. In this particular case the plaintiff has claimed in this way:—"The plaintiff, as trustee of the estate of William Dodd insolvent deceased, claims 1765*l.* 13*s.* 8*d.* for money received by the defendant to the use of the insolvent and his estate, and interest thereon at the rate of 8*l.* per centum per annum; and the plaintiff as such trustee also claims a declaration that the payment by the said William Dodd, on or about the 9th day of January 1902, of the sum of 1765*l.* 13*s.* 8*d.* to the defendant, was made by the said William Dodd within three months of the insolvency of the said William Dodd when unable to pay his debts as they became due from his own moneys in favour of the defendant, a creditor of the said William Dodd, and was a fraudulent preference within the meaning of the *Insolvency Acts* and void as against the plaintiff, or alternatively was made with the intent of delaying hindering or defrauding the creditors of the said William Dodd, and was void and of no effect, and for an order that the defendant repay such sum to the plaintiff, as

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as aforesaid, with interest thereon at 8*l.* per centum He asks for a declaration as to all these things, purpose that I can see than to establish a claim to ef. He could not have got a declaration at common e *Judicature Act*, even if he could get a declaration eclaration is granted by a court of equity, and may hether any relief is prayed or not; and I should say tatement of the declaration he seeks, he seems to d to proceed on the equity side of the Court, if I .

as asked us, if he cannot prevail upon us to say titled to a jury as a matter of right, to exercise a his favour and grant a jury in this case. I think ther Rule 3 or Rule 7A of Order XXXVI. we should to do so if we pleased, but we all agree that this is which we should grant a jury. To do so would, injudicious and serve no good purpose, and would instead of a saving, of money. This appeal will allowed, and so much of the order for directions as he action be tried by a Judge with a jury will be nd a direction substituted that the action be tried

Appeal allowed with costs.

for the plaintiff: *Moule, Hamilton & Kiddle.*
for the defendant: *Braham & Pirani.*

H. I. C.

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F.C.

1903
November 13.

In re the INCOME TAX ACTS.

Income Tax Act 1895 (*No.* 1374), *s.* 9, *sub-ss.* 1, 2 (*g*) (*h*), *and* 4—*Deduct Travelling expenses to and from place of residence and business from another place of business—Travelling expenses of director of company—with improvements thereon used for the purpose partly of gain and pa residence—Liability to tax—Estimate by Commissioner of capital va portion used for residence.*

The expenses incurred by a taxpayer in periodically travelling backwar forwards between one place, where he both resides and carries on busines other places where he carries on business, solely for the purpose of earni profit derived from the trade carried on at the latter places, may be deducte the taxable income earned therefrom.

Per HOLROYD, A'BECKETT, and HODGES, JJ. (the latter doubting), expenses incurred by a taxpayer in periodically travelling backwards a wards between one place where he both resides and carries on business and a place for the purpose of attending meetings of directors at the latter plac of earning fees payable to him periodically for acting as such director, n deducted from the taxable income earned by him as such director.

Where a portion of land was used for the purposes of a trade, and a p of the dwelling-house erected thereon was used for the purpose of doi clerical and managerial work in connection therewith, while the rem portions both of the land and the dwelling-house were used for the purp residence and enjoyment,

Held, that the actual capital value, as estimated by the Commissio Taxes, of the portions used for the purposes of residence and enjoyme liable to income tax at the rate of 4 per cent. per annum.

SPECIAL CASE stated by the Commissioner of Taxes u sec. 17 of the *Income Tax Act* 1896 :—

(1.) The taxpayer is the owner of a property in Vic known as "X," where he dwells, and there carries on the of a grazier, from which he derives income within the me of the *Income Tax Act*, and which he personally manages directs.

(2.) He is also the owner of two other estates in Vic "A" and "B," where he carries on the trade of dairying, which he also derives income, and which he also manage directs, as hereafter appears.

(3.) In order to earn the profit he does from each of last-mentioned properties, the taxpayer visits them from ti time, and he accordingly travels on the average once month from "X" aforesaid to "A" and "B" respectively and

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again to "X," for such purpose spending a day or two at each place to personally inspect and supervise the work there and give directions.

(4.) In assessing the income of the taxpayer for the purpose of income tax, I refused to allow the travelling expenses thus incurred by him as a deduction from the taxable amount of his income.

(5.) The taxpayer is also a member of the Boards of Directors of certain companies, whose head offices are situated in Melbourne, and he thereby earns certain fees, which are payable periodically for acting as such director, and not by a specific sum for each meeting of directors attended by him. To attend such meetings he travels from "X" to Melbourne, and has to return thence to his place of residence.

(6.) In assessing the income of the taxpayer I refused to allow the travelling expenses incurred by him in attending such Board meetings of Directors as a deduction from the taxable income derived by him as such director.

(7.) The taxpayer dwells with his family and has his domestic establishment at "X" aforesaid. The dwelling-house is a substantial family residence with about three acres of garden and ornamental grounds, and containing many rooms. All the clerical work of the business carried on on the "X" property—from which business the income referred to in paragraph 1 is produced—and the greater part of the managerial headwork of or connected with the said business are transacted in the said dwelling-house, where the person managing such business under the immediate supervision of the taxpayer lives and has his office.

(8.) In assessing the income of the taxpayer for the year 1902, I, in pursuance of sec. 9, sub-sec. 4 of the Act No. 1374, charged him with income amounting to 78*l.* per annum, being 4 per cent. on the capital value as estimated by me of that portion of the house and premises at "X" used by the taxpayer as a dwelling-house.

The questions submitted for the opinion of the Court are:—

(1.) Is the taxpayer under the provisions of the *Income Tax Acts* entitled to claim as a deduction from the income earned by

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him from the trade carried on at "A" and "B," the ex incurred in travelling from "X" to his properties "A" an and back?

(2.) Is the taxpayer under the provisions of the sai entitled to claim as a deduction from the taxable income by him as a director of companies the expenses incur travelling from "X" to Melbourne and back?

(3.) Is the capital value of any portion of the hou premises at "X" subject to taxation under the *Incom Acts*? If yea, upon what principle is the amount to be at?

THOS. PROUT WEBB,
Commissioner of Ta

Box for the Commissioner of Taxes—As to questions ((2), Sec. 9 (2) of the *Income Tax Act* 1895 provides the n in respect of which no deduction from the gross amount taxpayer's income is allowed, and amongst them is (*g*)— disbursements or expenses whatever not being wholly and sively laid out or expended for the purposes of such "Trade" is defined by sec. 2 to include "every pro vocation trade business calling employment and occup These travelling expenses are not "wholly and exclu expended for the purposes of the taxpayer's trade." If th payer chooses to live away from his place of business, he deduct from his gross income the expense of getting to an such place of business.

[A'BECKETT, J. The case as stated says that these ex are incurred "in order to earn the profit he does," etc.—t for the purposes of his trade. For what other purpose say that these expenses are incurred?]

The taxpayer may enjoy himself in going on these r journeys, or may do other things at these various places. had only one place of business he would not be allowed to the expenses of travelling between there and his residence there is no reason why he should be allowed such ded merely because he has several different businesses at di places.

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[HOLROYD, J. Is it open to you on the case as stated to say that these expenses were incurred for purposes other than those of his trade? The taxpayer lives at one of the places where he carries on business. He cannot live at them all. The expenses are wholly and exclusively for the purpose of going from one to another of these places.]

The tax is levied upon the taxpayer's whole income.

[A'BECKETT, J. Each of his businesses is a separate element in the assessment, and the deduction of the travelling expenses to each place of business is in respect of one such element.]

In England there have been decisions directly in point. The *Income Tax Act* 1842, sec. 100, Schedule D., provides that in certain cases there shall be no deduction "for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade," etc. Sec. 9 (2) (*g*) is clearly taken from this rule, which, being considered harsh in its operation, was modified by sec. 51 of the *Income Tax Act* 1853, which provides that it shall be lawful to deduct "expenses wholly exclusively and necessarily incurred in the performance of the duties of a public office" from the amount of salary, etc., to be assessed. Under this section the Court of Appeal in *Cook* v. *Knott* (*a*) disallowed a claim to deduct the expenses of travelling between two places where the claimant held offices, and the case is cited in *Dowell's Income Tax Laws* (5th ed.), p. 204, as equally applicable to the Act of 1842. In that case the taxpayer had to travel from one place to the other, not because he wanted to, but because he held the two appointments, and wanted to earn the income at each place. There, as here, he resided at one of the places when his income was earned. Under the New South Wales Act, 59 Vict., No. 15, sec. 29 (6), which provides that no deduction shall be made as regards the income derived from any trade in respect of "any money not wholly and exclusively laid out and expended for the purposes of the trade," it was held in *Re Adair* (*b*) that a deduction for the expenses of travelling from the taxpayer's residence to his place of business was quite outside the principle and intention of the Act.

(*a*) [1887] 4 *Times* L.R. 164. (*b*) [1898] 4 A.L.R. (C.N.) 42.

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[A'BECKETT, J. In that case the purpose of the taxpayer living where he did was the enjoyment of a suburban residen

The case of *Revell* v. *Directors of Elworthy Brothers* cited in *Dowell's Income Tax Laws* (5th ed.), p. 204, dec that directors are not entitled to deduct their travelling expe from their residence to the office of their company.

(3.) The annual value or rent of the dwelling-house is n permissible deduction, while the part used for the purposes of t is (sub-sec. 2 (*h*)); and land with improvements thereon used the purpose of residence and enjoyment is deemed to return income of 4 per cent. per annum on its capital value (sub-sec So that the intention of the Legislature is clear that, where of a house is used for the purpose of trade, and part is used the purpose of enjoyment, the latter part should be taxed in way provided by sub-sec. 4.

(He was stopped.)

Mitchell for the taxpayer—(1) and (2): "Trade" in sub-s (*g*) may and should be read as equivalent to "trades": See *Interpretation Acts* 1890, sec. 5. The taxpayer is taxed a his business at "X," and incurs actual expense in going to from his other places of business "in order to earn the p therefrom," in respect of which again he is taxed. The payer's personal supervision is necessary at all three places, the expenses of applying such supervision are necessary and wholly and exclusively applied for the purposes of such tra within the meaning of sub-sec. 2 (*g*). In *Re Adair* (*d*) the payer was not earning income at his place of residence, and that ground alone that case is clearly distinguishable from th

(3.) Sec. 4 is confined to the case of land and its impro ments being used wholly for the purpose of residence enjoyment, and does not apply to the case of a large est where the residence is also used for the purpose of gain. Th is no machinery provided by the Act for arriving at the cap value in such a case, or enabling the Commissioner to say w part of the house and grounds is used for the purpose pleasure and what part for the purpose of gain. In the c

(*c*) [1890] 3 Tax Cas. 12. (*d*) 4 A.L.R. (C.N.) 42.

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struction of a taxing Act, if the person or thing sought to be taxed does not come within the very words of the Act, he or it cannot be taxed. There is a second question as to the principle upon which the capital value of the portion (if any) of the house subject to taxation is to be arrived at. It is impossible to estimate the capital value of the portion of the house and of the garden used for the purposes of residence and enjoyment.

Counsel also referred to the Act No. 1819, sec. 6 (1).

Box in reply—*Cook* v. *Knott* (*e*) is referred to in *Bowers* v. *Hardy* (*f*).

[HOLROYD, J. *Cook* v. *Knott* is distinguishable from this case, because it turned on the language of a section which is totally different from the sub-section in question here. There it was held that the expenses incurred in getting to the place where the office was to be carried on were not expenses necessarily incurred "in the performance of the duties" of such office.]

The travelling expenses are partly incurred because of the taxpayer's choice of residence at "X," and therefore cannot be deducted.

HOLROYD, J. The first question submitted for the opinion of the Court is this:—(1) "Is the taxpayer under the provisions of the *Income Tax Acts* entitled to claim as a deduction from the income earned by him from the trade carried on at 'A' and 'B' the expenses incurred in travelling from 'X' to his properties at 'A' and 'B' and back?"

We think he is entitled to make that deduction. The taxpayer resides at "X," where he has a large property. There he carries on the trade of a grazier, and he himself personally manages and directs that business at that place. He also owns smaller properties, which are not stated to have any dwelling-houses on them, or at any rate any residences for the owner and his family; and to each of those places it is necessary for him to proceed at certain periods for the purpose of the personal supervision and direction of the trade carried on by him there, without which the trade could not be carried on, or could not be carried

(*e*) 4 *Times* L.R. 164. (*f*) [1891] 1 Q.B. 560.

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on so as to earn the profit which it actually earns. The
shows plainly that the expenditure is necessary for the pur
of carrying on that trade—that the money is expended for
purpose and for no other purpose—and I do not see how it
be contended otherwise. We must accept the case as regards
facts which it contains.

The second question is whether the taxpayer, who
member of the Boards of Directors of certain companies w
have their head offices in Melbourne, and who thereby earns
paid to him periodically as such director, and is compelle
travel from his private residence at "X" up to Melbourn
order to perform the duties which enable him to earn those
is entitled to claim the expenses incurred in such travelling
deduction from his taxable income as a director of compa
These fees, like the profits of his business, are part of his inc
and the money which he employs in travelling up to Melbo
in order to earn them is expended for the purpose
enabling him to earn his income, and without paying t
expenses, apparently, he could not earn it. I may say I d
understand the difference between the going and the retur
in such cases. If he goes to Melbourne, he comes back to w
he lives; and in my opinion the expenses of going and retur
are both necessary for the purpose of earning the money.
not suppose that it is expected that, when a man goes u
Melbourne to earn money, he should remain there; that
never to go back to his residence; that he is to be permane
there because he earns a few pounds as a director there.

The third question put to us is—"Is the capital valu
any portion of the house and premises at 'X' subje
taxation under the *Income Tax Acts?* If yea, upon
principle is the amount to be arrived at?" We think that
capital value of that portion of the house and premises whic
used for the purpose of residence or enjoyment and not of
is subject to tax under the *Income Tax Acts*, and that
necessary for the Commissioner of Taxes to ascertain
ultimately decide what that portion is. I observe that, u
sec. 9, sub-sec. (2) (*h*) of the *Income Tax Act* 1895, it is prov
that "the rent or annual value of any dwelling-house

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domestic offices or any part of such dwelling-house or domestic offices *except such part thereof as may be used for the purposes of such trade* not exceeding such proportion of the said rent or annual value as may be allowed by the Commissioner" is not to be deducted in estimating the balance of the income liable to tax. Well, that exception shows that so much thereof as may be used for the purposes of such trade is to be deducted or may be deducted. It is to be observed that that sub-section relates only to a dwelling-house; therefore it would not be applicable to the present case. But sub-sec. 4 is applicable. Sub-sec. 4 provides that "whenever land with improvements thereon" (that is this case) "is used for the purpose of residence or enjoyment and not for the purpose of profit or gain by the owner or any person who would be liable to pay tax in respect of the income thereof if the same produced an income such land shall be deemed to return to such person an income of four pounds per centum per annum on the actual capital value thereof." That is what the Commissioner has taxed—has ascertained—in this case. It can only be ascertained by an estimate, and so it has been ascertained by the Commissioner. The land here is land with improvements upon it. A portion of the land, as distinct from the house, is used for the purpose of enjoyment only, and a portion only of the house is used for the purposes of gain. The Commissioner therefore rightly estimated the actual capital value of that portion of the house which was used for residence or enjoyment only and that portion of the land which is used for the same purposes. Upon the actual capital value so ascertained the taxpayer must pay tax at the rate of 4 per cent. We think there should be no costs of this special case.

A'BECKETT, J. With reference to the second question, I think it is material to observe that this is not a case in which the person who pays his expenses for the purpose of coming to Melbourne to attend a meeting of directors has a residence unconnected with any income earned at that residence, and selected without any reference to the desirability of that being a place of residence with a view to making an income. It is clearly stated by the case that the taxpayer's presence at "X"

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is necessary for the conduct of the business there. That is t place—as the case states—where the business is carried on und his personal supervision. Therefore, in this case, when he leav that place in which he is carrying on business—"X"—for t purpose of coming up to Melbourne to attend a meeting directors, he has to return to that which is another place which he carries on business producing income, and that place the place at which he resides; and it seems to me to be distinction which may be or may not be important. I am n saying what the difference would be if he were a mere suburb resident coming and going from the place where he resided, a which he occupied without any reference to his carrying business there. But here we have a taxpayer who com and goes from the place at which he is carrying on busine over which his personal supervision is necessary, and at whi it is necessary for him to be for the purpose of carryi on that business. When he goes from there—"X"—to "A" a "B" it is necessary for him to return to "X" to carry on t business at "X." So it is necessary for his business at "A" a "B" that when he goes from there to "X" he shall return "A" and "B." We are dealing, therefore, with a case which travelling is necessary to three places, at each of which h presence is requisite for the purpose of his carrying on t businesses from which his taxable income is produced.

HODGES, J. I concur in the judgment which has be delivered. In regard to the first question, which is as whether or not the taxpayer is to be entitled to the deduction travelling expenses between "X" and "A" and "B," it appea to me that the taxpayer carries on business at each of tho three places to earn income at each of those three places, t income from all of which is taxed as one income under the A And the necessary expenses of getting from one place of incom earning to the other places of income-earning is, in my opinio an expense incurred by him for the purpose of the trade whi is being carried on at those three places. I do not take th expenses—under the case as stated—as expenses incurred by hi in getting from his residence to a place of income-earning, but

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his expenses of getting from one place where one part of his income is earned to another place where another part of his income is earned; and as the expense incurred simply in getting from one place to the other place is necessarily incurred for that purpose—is necessarily incurred for the purpose of earning income taxed—I am of opinion that this expense is "wholly and exclusively laid out for the purposes of the trade."

As regards the second question I have felt, and do feel, considerable difficulty; for while the whole which is taxed is one income which is earned through acting as a director in Melbourne, as well as through carrying on business in the other places, I have more difficulty in arriving at the conclusion that the expenses here were incurred in getting from one income-earning place to another, and my doubt is occasioned simply by a feeling and a view that it is rather getting from his residence to the income-earning place. However, I do not feel strong enough in my doubt to dissent from the judgment of the Court.

Questions answered:—(1) Yes. (2) Yes. (3) The capital value of the portion of the house used for the purposes of residence and enjoyment is subject to taxation.

Solicitor for the Commissioner of Taxes: *Guinness*, Crown Solicitor.

Solicitors for the taxpayer: *Stawell & Nankivell.*

H. I. C.

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3, 4, 5, 6, 7,
October 14.

A.

22. T. L. R. 28.

KANNULUIK *v.* MAYOR, ETC., OF HAWTHOR

Local Government Act 1890 (*No.* 1112)—*Construction of drains—In capacity of drain—Injury to private owner.*

A municipality employing an efficient, skilful engineer constructed within its district under the powers conferred by the *Local Government A* This drain was of insufficient capacity to carry off the water drains offensive matter that flowed into it, and, in times of heavy rain, caused da the plaintiff.

Held by the Full Court (HOLROYD, A'BECKETT, and HOOD, JJ.) t municipality was liable for the damages thus caused.

Per HOLROYD, J. That there is no provision in the Act which em the municipality to create a public nuisance.

Per A'BECKETT, J. That the casting of drainage upon private proper injury is not a necessary consequence of making a drain.

Per HOOD, J. That the decision of *Carslake* v. *President, etc., of t of Caulfield* ([1891] 17 V.L.R. 560) governed the present case.

East Fremantle Corporation v. *Annois* ([1902] A.C. 213) discussed.

APPEAL from judgment of Williams, J.

This was an action brought by the plaintiff, Jaan Kann against the Mayor, etc., of the City of Hawthorn. The alleged that the plaintiff was the owner of land and prem Malmsbury-street, in Hawthorn, and that the defendant and constructed a drain or watercourse within its mu district, running in a westerly direction through the di past the lands and premises of the plaintiff, and throug across and past various streets and roads in the district; th defendant also made and constructed large numbers of g drains, and ditches within the district either directly directly connecting with or flowing into the said main and that it allowed ratepayers to make drains and d connecting with or flowing into the main drain; tha defendant collected and concentrated in the said main and other drains large quantities of water drainag offensive matter; that the defendants permitted or suffere said water drainage and offensive matter to overflow th main drain into and upon and about Malmsbury-street an and upon and about the lands and premises of the plaintif permitted the water drainage and offensive matter in the drain to dam back the water, etc., in the other drains, wh

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the water, etc., in the other drains is forced or cast by the defendant upon the lands and premises of the plaintiff, and thus created a public nuisance. There was also a charge of negligent construction, based upon the statement that the main drain was not of sufficient capacity to carry off the water, and that it was badly graded. A further charge was also made of negligently permitting the water and offensive matter to be forced and thrown on the plaintiff's land, by reason of which the lands and premises had been flooded and damaged. The particulars of damage referred to flooding in 1896, 1897, 1898, 1899, 1900, 1901, and 1902. The plaintiff claimed 450*l.* damages, or alternatively compensation under the *Local Government Acts* and an injunction. By the defence it was alleged that part of the drain was originally cut and made in the position in which it now is by the plaintiff's predecessor in title for the benefit of the said land, and another part of it was originally cut and made in the position in which it now is by the owners of other lands adjoining for the benefit of the said land, and with the consent of the plaintiff's predecessor in title, and afterwards at the request of and in pursuance of an agreement with the plaintiff's predecessor in title and for the benefit of the plaintiff's land and the adjoining land the defendant improved the drain by putting it in the condition it now is. That all the things done or permitted to be done were done by the defendant under and by virtue of the powers conferred upon it by the *Local Government Acts*, and in the *bonâ fide* and reasonable exercise of the discretion given to it by the Acts, and the injuries, if sustained, were the natural and necessary result of the acts so done or permitted to be done. It was also further pleaded that the facts relied upon did not constitute negligence in law or such negligence as would give rise to any cause of action against the defendant; and further that no cause of action was disclosed, inasmuch as there was no allegation that the things done were done by the defendant oppressively or *malâ fide*.

The evidence of the plaintiff was chiefly directed to prove that the main drain was insufficient to carry off all the waters which the defendant allowed to flow into it. Evidence was given showing the number of drains from other streets which

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were allowed to be connected with the main drain, and t other municipalities were allowed to carry their drain through the defendant's district and into this main drain, that its capacity was altogether insufficient. Evidence was given as to the flooding of the plaintiff's property from time time. The further facts material to this report app sufficiently from the judgment of Williams, J., and from judgments of the Full Court.

The following reserved judgment was delivered by WILLIA J.:—Though the hearing of this case occupied me for considerable time, I can, I think, dispose of it briefly. regards the evidence of the experts or scientific witnesses accept the evidence of Monash and Bernard Smith, exp witnesses for the plaintiff. Accepting their evidence find that portion of the drain from Auburn-road to where drain joins what is called Davis's drain was manifes insufficient to carry off the water flowing off the drainage a in heavy but not phenomenal rainfalls. I find that this was case when the portion of the drain referred to was origina constructed, and that this fault or defect of incapacity has b since magnified from time to time by the formation and c struction of the defendant's tributary channels leading into main drain, thus concentrating water from the drainage a and causing it to flow with greater velocity into the main dr I find that the drainage area to be provided for was 470 or acres. That that portion of the drain from Auburn-road where it joins what is called Davis's drain is capable of charging when quite full 155 cubic feet per second, or one-th of an inch of rain flowing off from the drainage area in an ho and no more, and that the minimum discharging capacity of t drain at the portion referred to should have been 250 cubic f per second. When this portion of the drain was constructe find that this portion of the drain was accustomed, in consequen of its defective and insufficient capacity in heavy, but extraordinary or phenomenal rains, at and about the first a second bends, to overflow its banks on to the plaintiff's premis and that this overflow occasionally invaded his house, and th

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in consequence of these overflows damage was occasioned to the plaintiff's premises, furniture, and goods. I find that the incapacity of this portion of the drain to carry off the water flowing from the drainage area on occasions of heavy rains was owing to the absence of reasonable care, calculation, and forethought on the defendant's engineer, Clayton, in designing and planning the work, and that this absence of reasonable care, calculation, and forethought was further and more conspicuously manifested in the formation and construction from time to time of tributary channels leading into the drain, with the effect I have already mentioned. I therefore find that the defendant by its engineer has been guilty of negligence as regards the design, plan, and formation of this drain, and that by reason of such negligence—by which I mean want of such reasonable care, calculation, and forethought as I have mentioned—damage has been occasioned to the plaintiff's premises, furniture, and goods by water overflowing from it. Otherwise I find that the drain has as to construction been well and efficiently constructed. I assess the plaintiff's damages at 250*l*. I ought to add that I find Clayton was a skilful and competent engineer.

Counsel's main argument in this case for the defendant was that the defendant, provided it employs a competent and skilful engineer, cannot be held responsible for negligence in design as shown by the plans according to which the work was executed, provided that the work was well and efficiently constructed in accordance with the designs and plans, and that the defendant was within its authority in constructing the drain, but that it might be held responsible for damage occasioned by negligence in the work of construction or for excess of authority. I may at once say in reference to this contention that there may be much in it, and it may possibly be correct, but that I do not intend to act upon it. There have been scores of decisions in this Court, chiefly, I admit, at *nisi prius*, but which have never been challenged, and also many decisions of the Full Court, by which municipal bodies have been held liable for this same species of negligence, and as a Judge of first instance I am not going to take the liberty of sweeping them away. I follow those decisions, and leave the Full Court to upset them if it thinks fit

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to do so. I therefore order judgment to be entered fo plaintiff for 250*l.* damages with costs. Plaintiff not to get of any issue on which he has failed. I may add that if I given my decision in favour of the defendant in this would have done so without awarding costs. (His H stated his reasons for this announcement.) It has n my opinion, fought fairly. The real issues the parties ca fight were—(1) as to the reasonable sufficiency or capac this drain except in times of phenomenal rains; (2) assumi non-sufficiency or incapacity, liability or non-liability o part of the defendant for want of reasonable care in desi the part of a competent and skilful engineer. . . . T this view as to costs, I give defendant no costs on the upon which it has succeeded, *e.g.*, as to public nuisan which point I find in favour of the defendant.

From this judgment the defendant now appealed.

Isaacs, K.C. (with him *McArthur*) for the appellant— is no evidence of negligence on the part of the defe Unless something approaching *malâ fides* or oppression proved (and it is not proved) the work complained of is ju as being done under express statutory powers. The disc of the municipality as to the mode of making the drain the size of the drains, is not to be placed under the rev any tribunal. The council merely improved the drain. inhabitants of the municipality are incorporated; they are for the purpose of conducting municipal affairs, *i.e.*, m roads and drains for their mutual benefit, and one c corporators, when the thing done is for the benefit of all, turn round and complain that the act was unlawful. question is, had the defendant authority to do the act? power is given by the *Local Government Act* 1890. Th addition, if the municipality has this statutory power, car one else review the exercise of their discretion? The obli is on the plaintiff to show that it was so unreasonable was outside their discretion. The municipality cannot do than get a skilled engineer to devise and carry out the wo is empowered to make.

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[HOOD, J. Are you not concluded by the decision of this Court in *Carslake* v. *Shire of Caulfield* (a).]

No; in that case it was held that the defendant could not take water and deliberately shoot it upon another's land. Here there is power to make the drain, and the drain is properly made. The principle is that you look at the Act of Parliament in the case of a public body exercising a public trust, and you ascertain the jurisdiction given, and if the work is done within the authority then the public body is not liable. The principle is clearly enunciated in the case of *East Fremantle Corporation* v. *Annois* (b); it was laid down there—"The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action." That precisely covers the facts of this case, and it is inconsistent with the principles laid down in *Carslake's Case*. The decisions in the cases of *Boulton* v. *Crowther* (c), *Sutton* v. *Clarke* (d), *British Cast Plate Manufacturers* v. *Meredith* (e), are applied in the case of *East Fremantle Corporation* v. *Annois*. The defendant had power to make drains; it had an obligation to make drains, and the mode of doing it is absolutely within the discretion of the municipality. The Court has no power to review that discretion. There has been no oppression and nothing unreasonable or unnecessary.

Counsel referred to secs. 378, 379, 381, 401, and 411 of the *Local Government Act* 1890, and to the following cases:—*Williams* v. *Raleigh* (f); *Curry* v. *Benalla Shire, etc.* (g).

Cussen (with him *Starke*) for the respondent—The case was put in three ways—trespass, negligence causing damage, including private nuisance, and compensation under the statute.

(a) 17 V L.R. 560.
(b) [1902] A.C. 213.
(c) [1824] 2 B. & C. 703.
(d) [1815] 6 Taunt. 34.
(e) [1792] 4 T.R. 794.
(f) [1893] A.C. 540.
(g) [1895] 21 V.L.R. 159.

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The decision in the Court below was based upon the princi that public bodies should act without negligence, a "negligence" means a want of reasonable regard for the rig or property of those who are affected by the works purported be done under the Statute. The judgment of Williams, means that there was negligence in 1889, 1890—that is, at time the drain was commenced—and also negligence in tributary drains and in the rest of the drains, and also in use of the drains afterwards. It is not so much that the dra were badly constructed, but that, so far as regards the up drain, they were too well constructed and carried the water quickly down to our property. The duty the defendant owe was to make the drains so as not to throw the water on property. In *East Fremantle Corporation* v. *Annois* the corporation had to cut down a road, and could not h causing the injury, but here in making the drains the defend could have done the work so as not to cause the injury. *Pri facie* a corporation is as liable for wrongful acts as an individ for negligence. Whoever undertakes a duty is liable negligence in the discharge of such duty: *Gilbert* v. *Corporat of Trinity House* (*i*); *Beven on Negligence* (2nd ed.), p. 334. the case of *McDonald* v. *Shire of Coburg* (*k*), Holroyd, J., d attention to the two propositions in this class of case—on principle of law, and the other a rule of construction. Ther only one rule of law on the subject. Assuming *bonâ fides* if w has been done (in this case, flooding) is within the express te of the statutory power or necessarily results from its exercise action can be brought except such as is expressly provided The rules of construction are of importance, not as affecting t rule of law, but in measuring the extent of the statutory pow *e.g.*, if a mere permissive power is given without duty or obligati or if the undertaking is conducted for private benefit, the Co as a matter of construction will say—"You must not inj private rights at all." That is, the authority does not extend injuries to private rights or property at all. On the other ha if there is a duty as well as a power, and if it is for pul

(*h*) [1902] A.C. 213. (*i*) [1896] 17 Q.B.D. 795
(*k*) [1887] 13 V.L.R. 268.

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purposes, the Court will say that the fact that private rights are injured is not conclusive against the existence of the power to do the act. A distinction must be drawn between permissive powers and discretionary obligations. The difficulty is to get the extent of the statutory authority, and these rules of construction are used to find out the extent. The rule of law will apply as soon as the extent of the power is found out. No action will lie for doing that which is expressly authorized. Here the question is, is the flooding a necessary result of the power given? The question of compensation has a bearing upon the argument, because if compensation is given by the Statute the Court will give a more extensive construction to the power. If the damage results from the attempted exercise of the power, which need not necessarily flow from the exercise of that power, then an action will lie. The damage done in this case does not necessarily follow from what the defendant was empowered to do under sec. 401 or sec. 411 of the *Local Government Act* 1890. Therefore it was not expressly authorized. The plaintiff does not complain of making the drains at the lower portion, but really for not making drains, or not making sufficient drains; he complains of the flooding.

[Hood, J. What do you mean by necessarily resulting from the exercise of the power?]

I mean that the result cannot be avoided. They are to do as little "damage as may be." It has nothing to do with the cost of carrying out the scheme. The *Local Government Act*, far from showing any intention that private rights should be interfered with by direct injury, indicates quite the contrary intention by providing for compensation wherever private rights are touched. If a thing done is for the public benefit, then, unless there is an intention to the contrary, the individual injured has a right to be compensated. The present case is concluded by the decision in *Carsluke's Case*. There is no fresh law enunciated in *East Fremantle Corporation* v. *Annois*. *Sutton* v. *Clarke* was not followed by this Court, and that decision is not revived by the judgment in the Privy Council.

Counsel referred to the following cases:—*Dennis* v. *Vic-*

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torian Railways Commissioners (*l*); *Victorian Woollen Mil* v. *Board of Land and Works* (*m*); *Brett* v. *Slater* (*n*); *Londo and N.W. Rly. Co.* v. *Evans* (*o*); *Bligh* v. *Rathangan Rive Drainage District Board* (*p*).

If the plaintiff is not entitled to the amount awarded a damages, he is entitled to it as compensation by virtue of th decision and facts in the case of *The President, Councillor and Ratepayers of Colac* v. *Summerfield* (*q*), even thoug the drain does not go through his land.

Isaacs in reply—Either *Carslake's Case* does not apply or els it is met by sec. 5 of Act No. 1460 (*r*).

[HOLROYD, J. Can you possibly distinguish *Carslake's Ca* from the present?]

Yes; here we have no power which we could use similar t that which the Court decided should have been used in the case. It was said there that the powers conferred by othe sections should have been used. The plaintiff here is not in th same position at all. If *Carslake's Case* goes further than thi then it is overruled by the decision in *East Fremant Corporation* v. *Annois*. It was the duty of the defendant to d this work, and in doing it the defendant represented the citizens *Municipal Council of Sydney* v. *Bourke* (*s*).

Counsel referred to *Stretton's Derby Brewery Co.* v. *Mayo of Derby* (*t*.)

Cussen referred to *Mersey Docks Trustees* v. *Gibbs* (*u*).

Cur. ad. vult.

(*l*) [1902] 28 V.L.R. 576.
(*m*) [1881] 7 V.L.R. 461.
(*n*) [1888] 14 V.L.R. 77.
(*o*) [1893] 1 Ch., p. 27.
(*p*) [1898] 2 Q.B. Ir. 205.
(*q*) [1893] A.C. 187.
(*r*) "Sec. 5. No action shall be brought against any municipality in respect of any works made or constructed by such municipality under or by virtue of Division 4 of Part XVI. of the *Local Government Act* 1880 or any corresponding previous enactment or in respect to any damage or injury arising out of the making or constructing of any such works by reason only that th municipality made or constructed th same or caused the same to be mad or constructed without exercising an powers created or conferred by sec. 41 of the said Act or any previous corre sponding enactment provided that suc works were made and constructed *bon fide* and before 1st January 1891 an were so made or constructed withou negligence."
(*s*) [1895] A.C., p. 439.
(*t*) [1894] 1 Ch., p. 442.
(*u*) [1866] L.R. 1 E. & I., at p. 112.

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HOLROYD, J., read the following judgment:—Although I e with the learned Judge who tried this action that ment should be given for the plaintiff, still I have regarded evidence from such a different standpoint that I find it ssary to state my own view upon the facts which I consider rtant.

think it has been proved that during the period of six s immediately preceding the commencement of this action plaintiff's premises and portion of Malmsbury-street ent thereto were repeatedly flooded, and that this flooding caused by the overflow of the water from what is known e main drain, which runs through the municipal district of thorn in a westerly direction, and past the plaintiff's land. overflow was due on each occasion to the insufficient city of the main drain to carry off quickly enough the r which was brought down into it during heavy showers ubsidiary drains, gutters, or ditches constructed either by defendant municipality or by individuals with its ission. The water turned into the main drain by means ese subsidiary channels came not only from Hawthorn, but art also from an outside area, comprising portion of berwell or Boroondara, as it has been indifferently termed e evidence, and partly from Kew. It was not all rainfall, it contained an admixture of drainage from houses and es, and where it had overflowed left behind it a deposit of ing slime with garbage and other refuse. The overflow, as as it happened, constituted a public nuisance by obstruct- public thoroughfare and emitting foul odours injurious to h, and a private nuisance whereby the plaintiff sustained ge to his house, his land, and his furniture.

he main drain was constructed piecemeal, at intervals of a years, commencing in 1888 and ending in 1896. During its ruction, and since its completion, building has progressed in icinity, sometimes very slowly, sometimes with rapidity, to present day. Both before and continuously since its letion, the quantity of water discharged into it by the idiary channels has been increasing, and the subsidiary nels have also increased in number. The additional surface

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rendered impervious, or partly so, by the paving of yar
asphalting of footpaths, and so on, would add sensibly to t
rush of water into the street channels when it rained heavi
So far back as the year 1896 at any rate the defendant l
been aware that the main drain was insufficient for its wo
and has not enlarged or regraded it, or improved it in any w
so as to abate the recurring nuisance; but has on the contra
persisted in multiplying and permitting others to multiply
subsidiary channels, whereby the happening of overflows
likely to become more frequent, and their mischievous c
sequences will be aggravated. It transpired that ot
properties round about the plaintiff's had been damaged in
same way as his; and according to Mr. Monash, the engineer
whom the learned Judge placed the greatest confidence,
regrading and widening a small portion of the main drain n
the plaintiff's house at a cost of about 100*l.*, he, and I presu
his neighbours, might even now be relieved from all fear
flooding. The corporation is in possession of an apparatus
machine, so to speak, which it has made or helped to m
dangerous, which it knows to be dangerous, and which it cou
but will not, render harmless. In my opinion the municipal
is not only responsible for damage caused to the property
individuals by the repeated nuisances which this danger
apparatus has occasioned, but may be restrained by injunct
from so maintaining or using the main drain as to render
repetition of such nuisances either probable or possible.

We were strongly pressed by the defendant's counsel wit
recent decision of the Privy Council in *Mayor and Councill
of East Fremantle* v. *Annois* (*v*). All that was established
that case was, as it was put by Lord Macnaghten, that if pers
in the position of municipal councillors, acting in the execut
of a public trust and for the public benefit, do an act which th
are authorized by law to do, and do it in a proper manner, thou
the act so done works a special injury to a particular individu
the individual injured cannot maintain an action. The "pro
manner" is, it seems, using reasonable care to do no unnecess
damage to the particular individual or individuals who must

(*v*) [1902] App. Cas. 213.

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red by the act: *Southwark and Vauxhall Water Co.* v. *ndsworth Board of Works* (*w*). The Council of East nantle was authorized by statute to make alter level . . and otherwise improve . . . . streets, etc., ing being said about any consequential injury. The Council ved to improve a street within the municipal district by ing the level. The work would appear from the description ave been greatly for the public benefit, and the alteration more than reasonably necessary so far as the plaintiff's ises were concerned, but the result was to leave her house he edge of a cutting, with a drop of six or eight feet to the . Under those circumstances it was held that the plaintiff no remedy against the municipality. But there is a great obvious difference between that case and the present one. work which the Fremantle Council had resolved to execute d not have been properly accomplished without causing ry to the plaintiff's property, whereas the Hawthorn main n could have been so constructed as to fulfil its purpose out occasioning any nuisance at all; and if that portion of here the mischief has occurred had when first built been l to carrying off without overflowing the water that was ed into it during heavy showers, yet when its insufficiency detected it might have been easily repaired. We were referred to any section or sections of the *Local Govern- t Act* 1890 which in my opinion justified the municipality lawthorn in causing or permitting the nuisances complained n this action. A mere general authority to make drains is enough: *Carslake* v. *Shire of Caulfield* (*x*). Sec. 411, copied n sec. 384 of the *Local Government Act* 1874, is the strongest ion; but shortly it has been decided to mean that the ncil may enter upon any land adjoining or lying near to any nway for the purpose of making and maintaining drains ough such land to carry water, clean or foul, from a place n which they may lawfully take it to another place to which y may lawfully bring it: *Brett* v. *Slater* (*y*). The appeal be dismissed, with costs.

(*w*) [1898] 2 Ch. 613, per Collins, J.
(*x*) 17 V L R. 560 and 583, per Hodges, J.
(*y*) 14 V.L.R. 77 and 83.

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1903
KANNULUIK v. MAYOR, ETC., OF HAWTHORN.

A'BECKETT, J., read the following judgment:—In this
the primary Judge has found that the defendant Council
structed a drain insufficient in capacity to carry off the w
which flowed into it, and constructed tributary channels wl
aggravated the michievous consequences of the original de
He has awarded damages to the plaintiff for injury resul
from the overflow of the drain. The point most pressed
the appellant was that the Council had acted in the exercis
its statutory authority, and was therefore not liable for co
quent damage, and that the decision of our Full Court
Carslake's Case might be treated as virtually overruled b
recent decision of the Privy Council: *East Fremantle Corpo
tion* v. *Annois* (z). It was also urged that the facts in
case were distinguishable from those in *Carslake's*. There
injury might have been avoided by the exercise of ot
statutory powers to take land for the purpose of a drain, mak
compensation, and it had not been shown that this could h
been done in the present case. But the ground of the decis
of the majority in *Carslake's Case* covers the facts of the pres
In *Annois' Case* the plaintiff sued a municipal body which
made a road under its general statutory authority, leaving
house at the edge of a cutting, with a drop of six or eight f
and she was held to have no right of action, as the munici
body was acting within its powers. To my mind there i
distinction as to the rights conferred by a power to make ro
and a power to drain. A road must run straight, and cannot
up and down in this place and that place to suit the convenie
of every householder along its course. Injury to one
happens to be much higher or lower than his neighbours i
necessary consequence of making the road. The casting
drainage upon private property to its injury is by no mean
necessary consequence of making a drain. It is also to
observed that the judgment in *Annois' Case* proceeds on
principle of the old authorities to which it refers: *British C
Plate Manufacturers* v. *Meredith* (a); *Boulton* v. *Crowther*
In each of these a specified work was authorized, and all t

(z) [1902] A.C. 213.
(a) 4 T.R. 474.
(b) 2 B. & C. 703.

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s involved in carrying it out was therefore held to have been ntemplated and also authorized. The plaintiff, injured by the ng of the particular thing which the Legislature had said the endant might do, had therefore no right of action. The same not be said of a general power, such as that of making drains, plied from a general power to make roads—an authority rcisable over a wide area at such times and in such manner those entrusted with it may think fit. The question is ether such an authority ought to be construed as an authority make a drain for the benefit of one part of the area, though it y injure another part—a question which *Carslake's Case* has swered in the negative. That case still binds this Court, and herefore agree that the appeal must be dismissed.

HOOD, J., read the following judgment:—In considering this e, I disregard the findings of the learned primary Judge, ause I think he was in error in holding that the defendant's gineer, Clayton, was guilty of negligence. There appears to me be nothing wrong, either in design or execution, in the works t Clayton supervised. It is going too far to say that there is ence of reasonable care, calculation, and forethought because an, in preparing a plan for an isolated drain, not part of a nprehensive scheme, does not provide for future unknown uirements, arising from an unknown use to which this drain y be turned. Besides, Clayton's drain had nothing to do with injury to the plaintiff, and of itself is harmless. Indeed, that ury, as things have turned out, would have been much greater n it is had it not been for what Clayton did. The plaintiff's l complaint does not arise there, but turns upon the works cuted subsequently by the defendant, and the result of those rks. The defendant made roads on the higher lands, and reby concentrated and accelerated the flow of water on to the ver levels, without providing an increased discharge, and reby injury was done to the plaintiff. Upon this point, if I t free to follow my own opinion, I would say that the endant is not liable. To paraphrase the words of the Privy uncil, the defendant, acting in the execution of a public trust d for the public benefit, made roads which it was

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authorized by law to make, and made those roads in a pro manner, and though thereby a special injury has been done t particular individual, no action can be maintained—see [19 A.C., at p. 217. The principle is that "no action at common will lie on behalf of a man who sustains a private injury by execution of powers given by an Act of Parliament, those pow being exercised with judgment and caution:" *London North-Western Railway Co.* v. *Bradley* (c). On the evidenc this case, I feel satisfied that the defendant acted reasona and prudently, though opinions formed after the event m differ as to whether or not something better might not have b done, and so it seems to me that no action should lie aga it. That was the opinion of Higinbotham, C.J., and my in *Carslake's Case* (d). The majority of the Court, howe took a different view, and that decision is, I think, in po The result of that authority is that the corporation is liabl water passed on the plaintiff's land by reason of works lawfu themselves and executed without negligence.

The argument in support of that proposition which appea to me the most forcible was based upon the history of legislation. But the fact which outweighed this to my m was that the Legislature had dealt with the Local Governm law after the decision of this Court in *Shire of Ballarat Beaton* (e) without in any way disapproving of that decisi which upheld the non-liability of corporations in cases such the present.

Two other reasons were given for the decision in *Carsla Case*. The first was that it was not shown that there was absolute necessity to discharge water over private lands in or to drain the roads. No definition was given of the express "absolute necessity" in such a connection. Engineering sk with unlimited capital can almost always eliminate any necessi and no matter what the physical conformation of the coun might be, the drainage of the roads could commonly be got rid if expense were no object, so that it is hard to conceive of a case where it would be absolutely necessary to drain the roads

(c) 3 Mac. & G., at p. 341. (d) 17 V.L.R. 560.
(e) 3 V.R. (L.) 163.

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adjoining lands. I considered, therefore, that a more moderate w should be taken of the duty of these corporations, and I ld not agree with this contention. I thought that so long as flow of the water was the natural result of what the endant honestly and carefully did, we could not dictate to how it should carry out its road system, nor should we that these bodies created for road-making, and with limited omes, were to be compelled to either leave the roads alone or to go to great expense in tunnelling and excavating, or in ing compensation.

The other reason in *Carslake's Case* was that the Council s bound to use its further powers of taking land in order to vent the flow of water over the plaintiff's property. As to s, I thought that those powers were discretionary in the endant, to be used as it deemed fit, and were inappro-ate and insufficient for the purpose suggested. The view of minority in *Carslake's Case* was that the corporations are powered to make and drain roads as they think best in the erests of the whole body, and that no action would lie for any sequential injury, even amounting to nuisance or trespass, ply because the corporation by the expenditure of money ght have prevented it. That view, however, was not accepted the majority of the Court, and it is substantially what is now ued for on behalf of the defendant here. It was urged that the poration in *Carslake's Case* was held liable because it had centrated the water and wilfully sent it on to the plaintiff's d. There are some expressions in one of the judgments that y support this view, but it was not in my opinion the ground the decision. Very little extra water was poured on to the intiff's land, as is shown by the nominal damages, and the ole question was one of the right of the defendant to drain roads in the way it thought best, apart from negligence oppression. Exactly the same point arises here. The two es are indistinguishable, at all events in this defendant's our. The Hawthorn Council, like the Caulfield Council, de roads and drained them into a channel which led the water to the plaintiff's land. It was not foreseen here, as it was in *rslake's Case*, that the plaintiff would be injured, but the

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result is the same, and the only difference lies in the fact that th present defendant made the channel into which the roads a drained—a fact very much against it. I think, therefor that the decision in *Carslake's Case* includes this, and conside ing the circumstances under which it was arrived at, it ought be taken as finally settling the law for this Court. It was co tended for the defendant that the decision in *The East Fr mantle Corporation* v. *Annois* (*f*) is opposed to *Carslake's Ca* According to the cases, it appears that a corporation, when roa making, is not liable for damage resulting to the neighbouri land-owner by alteration of the levels, either by raisi (*McDonald* v. *Shire of Coburg*) (*g*) or by lowering (*Anno Case*), but if a drop of water runs off that same road on adjacent properties, an action will lie, and an injunction may issued (*Carslake's Case*). This seems a strange result to me, y I cannot say that the decisions are so absolutely in conflict th I am justified in treating the last-named case as overruled.

I therefore agree that this appeal should fail.

Solicitor for appellant: *T. P. Derham.*
Solicitors for respondent: *Westley & Dale.*

W. H. M.

HOOD, J.
1903
October 7, 8, 14.

29. V.L.R. 625

In re ROBERT GREW; CANAWAY *v.* CANAWAY.

Practice—Originating summons—Question of fact—Jurisdiction—"Rules of Supreme Court 1884*"—Order LV.*

The Court has no jurisdiction to determine a question of fact upon originating summons.

ORIGINATING SUMMONS.

This was an application by the plaintiffs, who were t surviving children of the defendant Julia Canaway, and t persons entitled in remainder under the will of the testator, f a "declaration that the defendant Julia Canaway is past chil bearing, and that the plaintiffs are all the persons and the on persons who are and will be entitled under the will of t testator as tenants in common in tail general expectant upon t

(*f*) [1902] A.C. 213. (*g*) 13 V.L.R. 268.

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he defendant Julia Canaway" in certain lands
the said will.

plication was supported by an affidavit of the
ulia Canaway, detailing certain facts. There was a
lavit by a medical practitioner, stating that, assuming
o be correct, in his opinion the said Julia Canaway
ild-bearing.

for the plaintiffs—The Court has jurisdiction to
his question: See *Martin* v. *Godfrey* (*a*), where it
your Honor that an originating summons for the
on of a question of fact may be issued and dealt with
r LV. of the "Rules of the Supreme Court," and *The*
ecutors and Agency Co. Ltd. v. *Smith* (*b*), where it was
dden, C.J., that, where there are no disputed facts, a
power to determine any question arising in the
ion of an estate.

main question, see *Ferrier* v. *Ferrier* (*c*) and *Re*
rusts (*d*).

Cur. adv. vult.

. Under the will of Robert Grew, his children were
life to various pieces of property with cross-
to their children. This originating summons was
sking a declaration from this Court that one of the
the testator is now past child-bearing, and that
e property may be distributed as though she had
t further issue. I propose to decline absolutely to
at question, as it seems to me to be determining a
fact. I am to say on affidavits that a woman has
time of life when it is impossible that she will ever
r child. I think that these summonses were never
r the determination of a question like that. I am
there are decisions the other way, and am very
t this case should be taken to the Full Court, in order
uestion should be finally settled. I refuse the
on the ground that I am not prepared to decide a

7 A.L.R. 256.
28 V.L.R. 707.
(*c*) [1897] 3 A.L.R. 33.
(*d*) [1874] 22 W.R. 639.

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HOOD, J.
1903
In re GREW.

question of fact on an originating summons. I give leave t appeal if the parties desire it.

Application refused.

Solicitors for the plaintiffs: *Farmer, Turner & Thompson.*
Solicitor for the defendants: *M. H. Davies.*

H. I. C.

HOOD, J.
1903
October 1, 2.

F. 27. A.L.T. 38 (1903) VLR 671

In the Will of NICHOLAS CHEVALIER.

Practice Probate—Administration bond—Dispensing with bond—Administratio and Probate Act 1890 (*No.* 1060), *s.* 15.

The Court has no jurisdiction to dispense with an administration bond. *In the Goods of Powis* ([1864] 34 L.J. (P.) 55) followed.

APPLICATION that "the sealed copy of the letters of admini tration with the will annexed of the estate of Nicholas Chevalie of 'Ashmore,' Sydenham Hill, London, England, and of Me bourne, Victoria, artist, deceased, granted to Caroline Chevalie of 'Ashmore' aforesaid, widow, as administratrix of th will of the said Nicholas Chevalier by the Principal Probat Registry of His Majesty's High Court of Justice, England, o the 31st day of May 1902, which is now filed in the office of th Master in Equity at Melbourne, be sealed with the seal of th Supreme Court of Victoria, and that the usual administratio bond and sureties required by sec. 43 of the *Administratio and Probate Act* 1890 be dispensed with."

It appeared from the affidavits that the gross value of th testator's estate in the United Kingdom was 1153*l*; that the sai Caroline Chevalier was the sole devisee and legatee of the testato that the only property possessed by the deceased in Victoria a his death was certain land, the right, title, and interest in whic had, in July 1902, been purchased by the Crown from the sai Caroline Chevalier for the sum of 35*l*.; that it was desired tha the sealed copy of the letters of administration, granted a aforesaid, be sealed with the seal of the Supreme Court o Victoria in order that a transfer of the said land from Carolin Chevalier to the King might be registered in the Office of Titles a Melbourne; that an application that the said copy of the letter

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dministration be so sealed had been made, but that, as the required by sec. 43 of the *Administration and Probate* 1890 had not been entered into, the sanction of the Court required to dispense with such bond.

Vasley for the administratrix, Caroline Chevalier, in support e application.

Cur. adv. vult.

OOD, J. An application was made in this matter for an dispensing with the bond in administration. I would ngly grant it if I had jurisdiction, but in my opinion I have Mr. Wasley relied upon the case of *In the Will and e of Snelling* (*a*), in which the bond was dispensed with, e very properly called my attention to the case of *In the s of Powis* (*b*), where it was held that the Court has no liction to dispense with the bond. The decisions are not in ct. By sec. 15 of the *Administration and Probate Act* it is provided that—"Every person to whom a grant of nistration shall be made shall previous to the issue of such nistration execute a bond to the Chief Justice of the Court ure for the benefit of the Chief Justice for the time being two sureties conditioned for duly collecting getting in and nistering the real and personal estate of the deceased which shall be in such form as the Judges of the Court shall by direct provided that it shall not be necessary for the tor or for any person obtaining administration to the use or he benefit of Her Majesty or for any person or persons or corporate specially exempted by any Act from the obliga- to give or execute such bond to execute any such bond." is, as a rule a bond must be given, but there are certain otions. In *Snelling's Case* the Master in Lunacy was the n applying, and he being within the proviso obtained an dispensing with the bond. It is clear that the Court ot dispense with the statutory requirements in the present I refuse the application.

Application refused.

olicitor for the administratrix: *Guinness*, Crown Solicitor.

H. I. C.

[1899] 24 V.L.R. 753. (*b*) 34 L.J. (P.) 55.

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HOOD, J.

1903
October 8.

[IN CHAMBERS.]

CHEYNE BROTHERS *v.* SCOTT.

Security of costs—Action by person out of jurisdiction—Summons for final ment pending.

Where an action has been commenced by a person residing out of the jur tion, the defendant is entitled to an order for security for costs, notwithsta the fact that a summons for final judgment has been taken out and is pendi

SUMMONS on behalf of the defendant, asking the plaintiffs should give security for costs. The plain Cheyne Brothers, who were out of the jurisdiction, sued defendant upon a writ specially indorsed, and had issue summons for final judgment, which was returnable on the October. The defendant took out this summons, return on the 8th October.

Dethridge in support of the summons—The plaintiffs re out of the jurisdiction, and the defendant is entitled as of ri to security for costs. If the plaintiff should fail in the ac the defendant will have no redress and no means of obtai payment of costs. The application ought not to be adjourne the ground that a summons for judgment is pending: *Banqu Travaux* v. *Wallis* (*a*).

Jardine to oppose—The defendant should show some *pr facie* defence when proceedings have been instituted an summons is actually pending. There should be someth alleged beyond the mere fact that the plaintiffs are out of jurisdiction.

HOOD, J. The case cited seems a clear authority that order should be made in such a case as this, and I will follow form of the order made there, by directing that the plain give security for 5*l.*, with liberty to the defendant to apply increase of security if the summons under Order XIV. be heard or be dismissed.

Solicitors for plaintiffs: *Lawson & Jardine.*

W. H. M.

(*a*) [1884] W.N. 64.

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OLIVER *v.* O'CONNELL.

HOLROYD, J.

1903
September 10.

sing Act 1890 (*No.* 1111), *s.* 142—*Second bar on licensed premises, per-ission to use—Transfer of premises—Right of transferee to use second bar.*

he right to use a second bar upon the licensed premises of a licensed aller does not run with the land, and a transfer of such premises does not e the transferee to use such second bar without obtaining permission for from the Licensing Court.

ORDER TO REVIEW.

The informant, George Oliver, charged the defendant, Grace onnell, under sec. 142 of the *Licensing Act* 1890, with ing more than one bar on her licensed premises, per-sion to have more than one bar thereon not having been nted to the defendant by the Licensing Court. It appeared in 1897 Mrs. Lyons was the holder of a victualler's nce for the hotel in question, and that in September of year permission was granted by the Licensing Court Mrs. Lyons to open an upstairs bar. In August 1898 . Lyons transferred the licence to the defendant, and such nce had been renewed every year since 1898. The defendant been in occupation of the licensed premises all the time, and carried on business in the upstairs bar in the same way as ad been carried on by Mrs. Lyons, but had never applied for never obtained permission from the Licensing Court so to Notice had been served on the defendant intimating that ess she obtained a permit from the Court for the use of this ond bar proceedings would be taken against her. No such mit was applied for, and the present proceedings were tituted. The Court of Petty Sessions fined the defendant 5*l.* e defendant then obtained this order *nisi* to review such ision on the ground "that the justices were wrong in fining endant inasmuch as the permission granted to Mrs. Lyons tified the defendant in continuing to keep the upstairs bar."

Mitchell to move the order absolute.

Bryant to show cause.

Cur. adv. vult.

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HOLROYD, J.

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OLIVER
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HOLROYD, J. It appears from the affidavit of Gra O'Connell that she was the licensee of the Manchester Clu Hotel in Bourke-street. The premises were transferred to h by Mrs. Lyons, the former occupant. In 1897 permission w granted to Mrs. Lyons by the Licensing Court at Melbourne open an upstairs bar. In August 1898 the transfer to Gra O'Connell was effected, and her licence was renewed from ye to year, and she has been in occupation up to the present tim and has carried on business in the upstairs bar in the same w as it was carried on by Mrs. Lyons. She received a noti in May 1903 that unless she obtained a permit to carry business in this upstairs bar proceedings would be taken again her for breach of sec. 142 of the *Licensing Act* 1890. She co tinued to keep the upstairs bar open, and proceedings we taken against her to try her right to do so, and she was fin 5*l.*, the justices holding that it was necessary for her to obta permission. This order *nisi* to review the decision of t justices was then obtained, on the ground, in effect, that t permission granted to Mrs. Lyons ran with the premis and passed to Grace O'Connell, the transferee. The questi turns upon the construction of sec. 142. That section distinct enacts that "there shall not save as hereinafter provided more than one bar on any licensed victualler's premises," a that the licensed victualler on whose premises any contraventi of this section occurs shall be deemed to have committed offence against the Act; and then the section proceeds—"Provid that whenever it is desired by any licensed victualler to ha more than one bar on his licensed premises it shall be compete for the Court to grant permission for two or more bars provid such bars are registered and described and are under t provisions of this Act subject to the supervision of the polic The present licensee is a licensed victualler; she fou the upstairs bar on the premises when they we transferred to her, and she desired that that bar shou remain there; she therefore desired to have that upstairs second bar on her licensed premises. She could not desire keep it unless she had it, and it seems to me that the wor "desire to have more than one bar" are equivalent to sayi

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at whether there is a second bar already there or not the ensee wants to have a second bar there. I see no escape from e plain meaning of the words used. I can understand that it ght have been sufficient to have enacted, as it has indeed been acted, that any additional bar should be registered and scribed, and if that had not been sufficient, that probably me arrangement could have been made for the continuance or scontinuance of the additional bar upon a transfer of the emises according to the wishes of the transferee. There is such provision in the Act, and nothing at all about the mode which registration is to be effected, or who is to keep the gister, or how it is to be altered if it is to be altered at all. seems the only safe rule is to follow the words of the Act. may be a very necessary precaution to make every new nant of licensed premises on which are two bars state dis- ctly whether he wishes to carry on the trade in the second r or not. The police will then know where they are, and the st sign that the licensed victualler desires to use the second r is for him to apply for and obtain the necessary permission. e order *nisi* will be discharged with costs.

Solicitor for Oliver: *Guinness*, Crown Solicitor.
Solicitor for O'Connell: *Seton G. Williams*.

W. H. M.

In re FERGUSON AND COMPANY'S TRADE MARK.

F.C.
1903
August 12, 1

ade Marks Act (No. 2) 1890 (No. 1183), ss. 17, etc.—Registration of trade mark —Right to oppose—"Words calculated to deceive"—Initial letters of words.

Letters which are commonly used to denote words may be "words calculated deceive" within the meaning of sec. 17 of the *Trades Marks Act* (No. 2) 90. The letters "P & O." held to be "words" within the meaning of that ction.

The right to oppose the registration of a trade mark on the ground that it is lculated to deceive is not confined to persons who can show that they will be jured by the deception.

APPEAL.

This was an appeal from the decision of the Commissioner of rade Marks refusing to register a trade mark in respect of whisky

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1903

In re FERGUSON AND COMPANY'S TRADE MARK.

in the name of Alexander Ferguson and Company. The particular of the trade mark was stated in the applicatio "the distinctive label," part of which consisted of th or letters "P. & O.," the whisky being described as "P whisky. The registration was opposed on the ground *alia*) that the proposed trade mark consisted of a words having reference to the character or quality goods, and that it contained words the use of whic by reason of their being calculated to deceive or othe deemed disentitled to protection in a court of justice.

The Commissioner decided that the use of the la calculated to deceive people into the belief that the ap whisky was supplied to the P. & O. steamships, and cont "There is no evidence that a single bottle is supplied and I think, therefore, that the use of the letters 'P. the labels is calculated to deceive. I shall therefore register the label."

From this decision the applicant appealed to the la who, under secs. 6 (5) and 13 (4) of the Act No. 1183, the appeal to the Supreme Court.

The grounds of appeal were (*inter alia*):—

(3.) That notice of opposition on the part of Danie ford and Son Limited, of Edinburgh, was not lodged wi prescribed time, and no extension was obtained on thei but only by Gollin and Co. Proprietary Limited, or their principals, Crawford and Co., of Glasgow.

(6.) That the letters "P. O." and the symbol "&" are n and therefore do not come within sec. 17 of the Act No.

(8.) That the opponents' whisky is not known as "P whisky, and that no confusion of trade has been or caused by the registration or use of the distinctive labe to be registered.

From the affidavits it appeared that the applicant, gow firm, had exported whisky to Australia for about and that in 1897 it commenced exporting its "P. & O." whisky, and sold it in various States, including Victori that description.

The further facts appear from the judgment.

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Cussen for the appellant—The words "calculated to deceive" ec. 17 of the *Trade Marks Act* (No. 2) 1890 must be limited the meaning "calculated to deceive so as to injure the ctor." The Court is, in dealing with opposition of this kind, fined to the grounds of objection taken. Even giving the er meaning to them, these are not "words calculated to eive." The Act carefully distinguishes between words and ers. *Cf.* sec. 8, etc.; *Kerley on Trade Marks*, p. 185. This ent opponent has no right to appear. (The facts on which last argument were based appear from the judgment.) er the Commissioner had given his decision, application was le to him to substitute the word Glasgow for Edinburgh. did so, but he had no power to do so. Sec. 30 gives ain powers of amendment, but it was not resorted to. As rule 67, see *In re Robinson* (*a*). Sec. 13 gives a month hin which to lodge notice of opposition. Then any person has lodged notice has three months within which to nd his grounds. The only people who could get any ension of time were Gollin and Co. The Commissioner should efore be directed that he should have disallowed the osition. If the opposition is excluded, the declarations by or behalf of the opponents are excluded, and cannot be looked

Bryant for the respondent—Sec. 13 says that any person y object.

He referred to *Eno* v. *Dunn* (*b*).

[A'BECKETT, J. Do you say that Gollin and Co. could object hin the month and then obtain an extension of time for some rd party.]

Gollin and Co. object on behalf of their principal.

He also referred to *Re Moet's Trade Mark* (*c*).

HOLROYD, J., delivered the judgment of the Court [HOLROYD, ECKETT, and HOOD, JJ.] We are all of opinion that this peal should be dismissed. Upon the construction of sec. 17 the Act No. 1183 we think the opponents had power to

(*a*) [1892] 2 Ch. 245, at p. 252. (*b*) [1890] 15 App. Cas., p. 262.
(*c*) 7 R.P.C. 226.

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In re FERGUSON AND COMPANY'S TRADE MARK.
Holroyd, J.

object, that the trade mark, for the registration of which a cation had been made, was calculated to deceive, and therefore disentitled to the protection of the Court.

It appears to us that the trade mark is one well calculat deceive. There is evidence that the Peninsular and Ori Steamship Company is well known and commonly spoken o the name "P. & O. Company," or the "P. & O.;" an this trade mark were allowed to be registered there w be upon the register a mark calculated to induce pe to believe that the whisky in respect of which it registered was whisky which was ordered or used by P. & O. Company or purchased and kept by them as pa their stock on ship board. It has been objected *inter alia* the letters "P. & O." are not words, and that in sec. 17 indicated what is forbidden—namely, "That it shall no lawful to register as part of or in combination with a trade any *words* the use of which would by reason of their b calculated to deceive or otherwise be deemed disentitled to tection in a court of justice." It is also urged that in sections the words "device," "mark," "brand," "head "ticket," "word," or "figure" are used, showing that it intended to preserve a distinction between words and le We think that these letters "P. & O." are practically for purpose words. A letter may be a word, and frequently is for a word. In this particular case the letters stand "Peninsular and Oriental," and are substantially words. the same way in some friendly and other societies letter used to designate officers by their titles, and various soc of all sorts are called by the initial letters of their real na We think that for these reasons sec. 17 covers this case.

Then it was objected that an extension of time was ap for by Gollin and Co., and that nobody else could take advan of that extension. It appears that Gollin and Co. did not a on their own behalf, but on behalf of their principals. The question was who these principals were. The firm which forward and took advantage of the extension was Daniel C ford and Son Limited, described as of Edinburgh. The les Commissioner held that he could alter the word Edinb

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lasgow. In the notice they are described as Crawford Co., of Glasgow. In the declaration of Ferguson he elf states that he was acquainted with Daniel Crawford Son Limited of Glasgow, and of a certain street in gow, but that he did not know of such a company at burgh. Taking these things together, and looking at fact, that nobody else came forward to take advantage of xtension of time but Daniel Crawford and Son Limited; they were treated as the real opponents; and that when the ter statement was made it was not objected that the sition by Daniel Crawford and Son Limited could not be tained, we think that the Commissioner had power to d as he did, and that there was sufficient certainty as to the principals were. The appeal will be dismissed, with

olicitors for the applicant: *Waters & Crespin.*
olicitors for the opponents: *Blake & Riggall.*

J. M.

MAYOR, ETC., OF RICHMOND *v.* GRAY.

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October 12.

Government Act 1890 (*No.* 1112), *s.* 246—*Rating—Rateable property—Land the occupation of the Government of Victoria—Exemptions—Prior judgment r rates—Estoppel.*

nd leased to the Government and occupied by a member of the police force tue of a regulation requiring him as part of his duty to occupy and reside rters provided for him by the Government is land in the occupation of the , and is exempt from rates under sec. 246 of Act No. 1112.

e fact that an order has been made by a court of petty sessions directing yment of rates for a particular year does not estop a person from raising estion of the rateability of the land in proceedings for the recovery of rates ubsequent year.

PECIAL CASE reserved by the Judge of the County Court at ourne for the opinion of the Supreme Court.

The action was brought by the Mayor, etc., of the City of mond to recover rates from the defendant in respect of in land. The defendant was a member of the police force. land was leased by the owner to David Martin, on behalf of Government of Victoria. By a regulation made by the

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Governor in Council, under sec. 16 of Act No. 476, it was p vided, "It shall be part of the duty of any officer or membe the police force to occupy and reside in quarters provided him by the Government." It was proved that the defend occupied this land under directions given in pursuance of above regulation. He was entitled to and received salary quarters, and was not charged anything for quarters. Th was a police station a few hundred yards away from the lan question, which was occupied by constables, and which could used for official purposes by all the police. The defendant resided in these quarters for some time with his family; occasionally performed official duties at this house; portion his uniform and accoutrements were kept there. Rent was p every quarter to the owner through the Treasury. It was proved that in the year 1902 the defendant had been sued rates, that the defence of exemption under sec. 246 of the *L Government Act* was raised, and that the complaint had b dismissed.

The following questions were asked:—(1.) Are the prem mentioned in the plaintiff's particulars of demand exempt un sec. 246 of the *Local Government Act* 1890 from being rated the municipal year ending 30th September 1903, on the gro that they are in the occupation of the Crown or the Governm of Victoria? (2.) Is the plaintiff estopped from denying s exemption on the ground that the question was determined the Court of Petty Sessions on 24th November 1902? (3. the defendant liable to pay to the plaintiff the rates sued for

Cussen for the plaintiff—The defendant occupies the lan question in the fullest sense of the term "occupation;" resided there with his family, and was the beneficial occup The fact that the Crown owns or leases the land is of importance; the question is one of beneficial occupation. question of title is nothing. The quarters allotted to defendant might be anywhere, and the use of the quarters is necessarily essential for the performance of his duties, it is essential as part of his duty. The principles of rating applica in England are equally applicable under our Statute. In

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of *Gambier* v. *Overseers of Lydford* (*a*) the distinction is plain. There it was held that the premises which were sary for the proper discharge of the duties of the officials exempt, but that other buildings occupied by the officers extent greater than was necessary to enable such officers rform their duties were not exempt. In the case of *Martin ssessment Committee of West Derby* (*b*) the superintendent e police was held rateable in respect of a house occupied by the rent of which was paid out of the police rates, because ccupation was a beneficial one, and the house, being no part e police station, did not come within the recognized heads roperty which is treated as Crown property: See also *vers* v. *Assessment Committee of Chelmsford Union* (*c*). In ase of *Reg.* v. *McLachlan* (*d*) a distinction is drawn between English law and the Victorian law relating to rating, but is no reason for any such distinction being made. The iple governing the laws of rating are the same. This point t covered by the decision in the case of *Mayor of Sandhurst omley* (*e*), because there is no principle laid down as to what es residence a part of the officer's duty. If it is necessary he performance of his duties, then such residence may not eneficial, but if he may reside anywhere, then such residence neficial, and is not essential to the performance of duty.

Mitchell (with him *Mann*) for the defendant—This land is e occupation of the Government, and the case is governed by *or of Sandhurst* v. *Chomley*, where it was held that where idence is provided by the Government for one of its officers residence is rateable if he be at liberty to forego the ntage and reside elsewhere; but where it is a part of his to occupy the residence provided, it is not rateable. In the ent case the defendant is compelled to occupy this place. re is no such special exemption in England, and the law of country is not applicable to Victoria.

The following cases were referred to:—*Coomber* v. *Justices*

) [1854] 3 E. & B. 346.
) [1883] 11 Q.B.D. 145.
) [1891] 1 Q.B. 339; 64 L.T. 755.
(*d*) [1867] 4 W.W. & A'B. (L.) 57.
(*e*) [1876] 2 V.L.R. (L.) 207.

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of Berks (*f*); *Hamilton* v. *Davidson* (*g*); *Wimmera* v. *Bri combe* (*h*); *Melbourne and Metropolitan Board of W* v. *Pike* (*i*).

The point with reference to estoppel was abandoned counsel.

Cussen in reply.

HOLROYD, J. This is a special case stated by the Judg the County Court for the opinion of the Full Court. The n question involved is whether the defendant was liable to rates to the municipality in respect of his supposed or alle occupation of this land. The owner of the land was one Bux who let it to David Martin on behalf of the Governmen Victoria. The defendant resided there by direction of Crown, and received free quarters in lieu of part of his wa It was the Crown who really occupied this land. The alle occupant was a servant of the real occupiers; he was told while he was in their employemnt he *must* take up th quarters. They could turn him out whenever they liked. the Government had been a private person who had pu servant into the place as occupant, the servant would not h been considered the occupier; most certainly the private pe who leased the land would have been held to be the occu We therefore think that the defendant is not liable. In ans to the first question we say we think the premises mentio in the particulars are exempt under sec. 246 of the *L Government Act* from being rated for the year in question.

In answer to the second question we say the defendan not estopped from denying such exemption on the ground the question was determined by the court of petty session November 1902. In answer to the third question we "No."

A'BECKETT, J., concurred.

HODGES, J. With reference to the main question as to exemption claimed under sec. 246, it appears that the defend

(*f*) [1883] 9 App. Cas. 61, at p. 72.
(*g*) [1899] 20 A.L.T. 142.
(*h*) [1897] 23 V.L.R. 217.
(*i*) [1899] 25 V.L.R. 563.

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y is an officer of the police. The regulations which were e with or without authority are before the Court, and they t that it shall be a part of the duty of any officer or ber of the police force to occupy and reside in quarters ided for him by the Government. The Government ided the property in question as quarters for this man. By rder contained in the regulation he was required to live in e premises while he retained the particular office he was holding or while he discharged the particular duties he was discharging. So that the land is under lease to the Crown; s occupied by an officer of the police at the direct order of aster requiring him so to do as long as he was discharging duties, to remain in those premises. The occupation by if it can be called an occupation by him, might be rmined at any moment by dismissal or by a change uties, by removing him from some particular duty and ting him to discharge others in another part of the e. If he went out, and was out for some time, I cannot t that while he was out the persons occupying these ises would be the Government of Victoria. While the ndant is there he is there by the direction of the Govern-, in obedience to their commands, and all that time he is sessions for the Government of Victoria. I therefore agree e answer given to the first question.

Ve have been referred to a number of English authorities h do not apply directly to our legislation. I entertain no t that it was originally intended that the law should be the here as in England, but there they have exempted land n the occupation of the Crown occupied by county councils. n once you get beyond the occupation by the Crown, the t naturally would be very strict in extending the exemp- Those cases do not bind us in interpreting our own on, which refers solely to the occupation by the Crown.

Solicitors for the plaintiff: *Scheele & Scheele.*

Solicitor for the defendant: *Guinness,* Crown Solicitor.

W. H. M.

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WILLIAMS, J.

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April 28.
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August 11, 12.

Varcoe v. Privy Council (1905) 21. Times L. R. 648.

MELBOURNE AND METROPOLITAN BOARD OF WORK *v.* METROPOLITAN GAS COMPANY.

Melbourne and Metropolitan Board of Works Acts 1890 (*No.* 1197), *ss.* 122, 1 1897 (*No.* 1491), *ss.* 3, 5, 8, 10—*Rates—Property rateable by the Boar Sewered and unsewered property—Gas mains connected with sewered prope*

The defendant, a gas company, owned and occupied or used certain la buildings, and works situated in various municipalities within the metropoli defined by the *Melbourne and Metropolitan Board of Works Act* 1890. Som such lands, buildings, and works were actually sewered; others were, in f unsewered, but situated within sewerage areas, whilst others were outside sewerage areas. Connected with, and used as part of the undertaking, wa reticulation of gas mains spreading over various municipalities, and so construc that every part of the whole undertaking was connected with every other par

Held by the Full Court (reversing Williams, J.) that such gas mains w not rateable by the Board under sec. 8 of the Act No. 1491.

The only property which is rateable by the Board under the Act 1197, modified by the Act No. 1491, is property which is either sewered or cap of being sewered.

ACTION AND APPEAL to Full Court.

In this action the plaintiff sought under its Acts No. 11 and 1491—

(1.) A declaration that all the lands owned, or occupied, used by the defendant within the metropolis as defined by t *Melbourne and Metropolitan Board of Works Act* 1890, inclu ing all the lands, buildings, works, and gas mains being part the undertaking of the defendant, are rateable by the plaint and constitute a sewered property within the meaning of t said Act and the Acts amending the same, which is subj to payment of three respective rates of one shilling each du made by the plaintiff.

(2.) Alternatively that all the lands, buildings, works, a gas mains which are connected and used together in the mann set out in paragraph 12 of the statement of claim severa constitute in each such case a sewered property subject to pa ment of the said shilling rates.

Paragraph 12 of the statement of claim was as follows: Certain of the said gas mains were, at the time of making of t said respective rates, connected with land and buildings a works erected thereon owned and occupied by the defenda

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g actually sewered or situated within a sewered area or ting upon streets or parts of streets in which sewers had laid. And the said gas mains were constructed and used part of the undertaking for the purpose of carrying and ibuting gas manufactured in such buildings or works.)

3.) Alternatively that all the said gas mains and the occupa- by the defendant for the purpose of its undertaking of the in which they are are rateable by the plaintiff and are liable rated as to so much thereof as lie within the sewered areas e rate of one shilling in the pound of the net annual value e same, and as to so much as lie without the sewered areas e rate of two pence in the pound of the net annual value of.

4.) Payment of the said rates and an order that they be a ge upon the said property.

t the trial it was admitted—

.) "That the dispute is as to gas mains only."

i.) "That the whole of the defendant's gas mains are con- d as one system with each of the gas works and each of the olders of the defendant, so that from any one gas works or older the gas can be distributed throughout the system of s subject to the qualification that one gas works or gas r could not supply the gas for all the mains."

ome of these works were actually sewered at the date of the ng of the rate, others were not.

he works and mains spread over a number of municipalities, such portions of them as were in any municipality were d and rated by such municipality, but there was no one cipal valuation of the whole undertaking.

he further facts appear from the judgments.

saacs, K.C., and *Mitchell* for the plaintiff.

Cox, Bryant, and *Cussen* for the defendant.

Cur. adv. vult.

April 28.

VILLIAMS, J., read the following judgment:—The question determined in this case is whether the gas mains of the ndant company are rateable by the plaintiff, and if so, are liable to be rated as sewered or unsewered properties?

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The answer to this question is not free from doubt, but in m opinion the gas mains of the defendant company are liable be rated by the plaintiffs, not as gas mains *per se*, but as pa and parcel of sewered or unsewered properties, as the case ma be. We start with this, that by secs. 122 and 123 of the o Act No. 1197, to put it very shortly, whatever property is rat able by municipalities is rateable by the plaintiff, and that f the purpose of making their rate, which is not to exceed o shilling in the pound, the plaintiffs are to take the municip valuations and those valuations only. This appears to me to the clear meaning of secs. 122 and 123 of the Act No. 119 These sections have been repealed by the Act 1491, and t question arises what is the effect of the new legislation contain in secs. 8 and 5 of that Act. It seems to me that, except in far as the later Act makes an obviously just distinction betwe sewered and unsewered properties, and makes a marked diffe ence in the amount of the rate which may be imposed up each class of such properties, no alteration has been made in t position which the plaintiff Board occupied under secs. 122 an 123 of the old Act. Sec. 8, sub-secs. 1, 5, and 6 re-enact, exce in the particulars I have mentioned, the powers and obligatio possessed and imposed on the plaintiff Board by secs. 122 an 123 of No. 1197, and apparently for the purpose of enabling t Board to meet its obligations to old creditors—that is, oblig tions incurred before the coming into operation of the later A —and for that purpose alone sec. 10 of the later Act re-enac the position held by the Board under sec. 122 of the former A subject to a proviso as to the approval of the Governor Council in regard to the properties within the area described the 4th Schedule which may be unsewered or which are outsi that area so described. It is conceded that the gas mains of t defendant company, the bone of contention in this case, are liab to be rated by the various municipalities through whose territo they pass, and for that purpose are included in the valuation made by those municipalities. The above being the position I view it, the question arises, Are these gas mains rateable, n *per se* and independently, but as part and parcel of sewered o unsewered property? And there is also the subsidiary questio

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answer to which depends on a question of fact, as to which e may have to be an inquiry, "Are any, and if so, what portion of them to be deemed sewered property within the ning of sec. 5, sub-secs. 1 and 3, of Act 1491?" Assuming the gas works or gas holders with which they are connected one system are sewered in fact, then the gas mains are nected with a sewer of the Board, and so are to be deemed to sewered property. As counsel put it in argument, the gas ks are the body, the mains are the limbs and tentacles; it all one undertaking, one property. Plaintiff's counsel rmed me that the Board is content to take a declaration. I efore make a declaration substantially as asked for in agraph 2 of the relief claimed, and direct that the rates med in this action shall until paid be and remain a charge n the property in respect of which the rates are claimed. ect an inquiry, if necessary, whether, assuming the law to be have stated it, if any, and if so, what proportion of the gas ns are sewered property and what unsewered. I ought tate that I have considered Mr. Box's main argument. That ument was to this effect, that only property is to be rated er the Act 1491 which is capable of being sewered, or which sewerable. That is a very taking argument, and I have no bt would be highly popular, but to give effect to it would be, my opinion, to take an unwarrantable liberty with the Act. re is not a word in the Act to support this contention. I e to consider, not what was the intention of the framers of Act, but what the Act has said. The Act refers in the rest terms to classes of property—property which is *de facto* ered, property which is *de jure* sewered, property which is sewered either *de facto* or *de jure*, and property which is hout the area described in the 4th Schedule.

From this judgment the defendant appealed.

Box and *Bryant* (with them *Cussen*) for the appellant—The tem of rating to be followed by the Board was, prior to the t No. 1491, prescribed by Part IV. of the Act No. 1197, secs. 2 to 130. The Act No. 1491 repeals all those sections except . 124 and sec. 130, substituting by sec. 8., etc., a new system of

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rating. The whole scheme of rating by the Board was therel changed. The later Act gives the go-by to the system of equ rate recoverable from the municipalities, and substitutes differential rate recoverable directly from the ratepayer. T rates which are the subject of the present action were made und that later Act. Sec. 5 of the same Act shows what are or a to be deemed to be sewered properties. The object of the ne system is clearly to make rateable land or property on whi houses actually are or are likely to be built—that is, proper capable of being sewered. The latter is to pay somethir though not so large an amount as property actually sewere The valuation which the Board is to act upon und sec. 8 must be the municipal valuation. That valuati is a condition precedent to the Board's right to rate the There is no municipal valuation in respect of the whole unde taking, including the gas mains. There is no proof that notic have been given with respect to all these properties. There no beneficial occupation by the defendants.

They referred to *Chelsea Waterworks* v. *Bowley* (*a*); *Pimli Tramway Co.* v. *Greenwich* (*b*); *Melbourne Tramway, etc.,* C v. *Mayor, etc., of Fitzroy* (*c*); *Metropolitan Board of Works Pyke* (*d*).

The word "property" in the Act 1491 means "property which is either sewered or is capable of being sewered und sec. 5. The mains clearly cannot be rated as a separa property.

Isaacs, K.C., and *Mitchell* for the respondent—The questio in this case are—(*a*) Are gas mains rateable under t *Melbourne and Metropolitan Board of Works Acts?* (*b*) rateable, are they rateable as a sewered undertaking? (*c*) they are, are they rateable according to the lengths of them the various municipalities? It is submitted that if they a rateable by the municipalities they are rateable by the Boa The latter is entitled to rate every property. One proper may extend over a dozen municipalities, and in that case t

(*a*) [1851] 17 Q.B. 358; 20 L.J.Q.B. 520.
(*b*) [1873] L.R. 9 Q.B. 9.
(*c*) [1899] 25 V.L.R. 5.
(*d*) [1900] 25 V.L R. 563, at p. 57

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rd is entitled to take the valuation of each municipality for part of the property within its bounds: *Cf. Metropolitan Co.* v. *Mayor of Melbourne* (*e*); *Melbourne Tramway and nibus Co.* v. *Fitzroy* (*f*). The meaning of "property" is the e in the new Act as in the old. Assuming that the ellant was caught by the Act 1197, there is nothing to w any change of intention as to that on the part of the islature. Sec. 131 shows that that was not so in the case the Act No. 1197.

[A'BECKETT, J. It seems to me that the question whether e mains are rateable depends on the meaning to be given he words "such properties as are sewered and such properties are not" in sec. 8 (1). I am inclined to adopt your view t there was no intention in the Legislature to exempt by No. 1 any properties which were not exempt under No. 1197.

HOLROYD, J. That seems to me to give the go-by to the that the Legislature have repealed certain sections in 1197.

A'BECKETT, J. The whole object of the new legislation was distinguish between sewered and unsewered properties, not exempt any properties not already exempt. Possibly the guage used has had a wider effect.]

The *Gas Company's Act*, sec. 249, shows that it is entitled to chase this land. The appellant is substantially the owner of land occupied by the mains. (They referred also to *Castle Rating*, 337, 339; *Pimlico Tramway Co.* v. *Greenwich pra*)). The meaning of the words "such properties" in sec. 8 must be same as the meaning attached to the words in sec. "all properties within the metropolitan area whether sewered unsewered." The latter section was clearly intended to pre- e the rights of then existing creditors. If the meaning con- ded for by the Board is given to these words the rights of sting creditors are preserved; if the meaning contended for the appellant is given, these rights are not preserved but are inished. Where the object of the Legislature is clear words l be construed having regard to that object: *King* v. *Hall* (*g*).

(*e*) [1899] 5 A.L.R. 76. (*f*) [1901] A.C. 153.
(*g*) [1822] 1 B. & C. 123, at p. 136 *et seq.*

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Applying that principle to sec. 10, its object is clear; it is preserve the rights creditors had before. Another principle construction is that a statute must not be so construed as take away existing rights unless that is the plain intention the Legislature. The opening words of sec. 10, "Notwi standing anything in this Act contained," apply to the provis of the Act repealing part of No. 1197 as well as to its ot provisions.

[HOLROYD, J. According to your contention, the comp would be liable to a penalty under sec. 5 (2) for not connect a property miles away because there are sewers on a small p of their works. You say the whole must be treated as sewe property.]

HOLROYD, J. The first question in this case appears to whether in calculating the rate payable by the Gas Company the Melbourne and Metropolitan Board of Works in respect sewerage the value of the Gas Company's mains is to be ta into consideration? The learned Judge who decided this c appears to have almost taken it for granted that it was, anc have only discussed the question whether the mains were be regarded as sewered property or as unsewered property. have come to the conclusion, certainly not without some dou that these mains are not liable to be rated at all. Under Act No. 1197 they might perhaps have been so. But by Act No. 1491, sec. 2, several clauses which, if I may use expression, would have caught the Gas Company's mains, h been repealed. Sec. 122 has been repealed, which provides t "The Board may from time to time but not oftener than o in each year cause an estimate to be prepared of the mo required for the several purposes in respect to which they authorized to apply the Metropolitan General Fund showing sums already available for such purposes the several su required and the total net annual value of the property ass able in the metropolis under any Acts relating to the city Melbourne or the other municipal districts respectively; and t when such estimate has been prepared the Board may from ti to time make a rate . . . . and shall assess the same up

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e several municipal districts within the metropolis"—I need t read the latter part of the section. That section and several ıer sections which follow upon it, and sketch out the scheme ich was to be followed in obtaining the amount of rate iable—namely, sec. 123 and secs. 125 to 129 inclusive—are repealed. The most remarkable portion of the repeal is that the words "the total net annual value of the property essable in the metropolis." That is gone altogether. The ıtention on behalf of the Board has been practically that sec. 2 is not gone—that in calculating the rate the total net ıual value of the property in the metropolis is to be estimated the same manner as it is for municipal purposes. I have not ırd, and I think my brothers have not heard, any argument ich weighs upon our minds to show why these words ve been struck out if the thing which they express was to be ained. When we come to look at what has been substituted what has been repealed, we find in sec. 8, sub-sec. 1, that ıe Board may," etc. (His Honor read the section.) Two sses of properties are mentioned there, only two, of which net annual value is to be ascertained, namely, propertie^{s} ıt are sewered and properties that are not. One would ɔpose therefore that the properties referred to were properties ɔable of being sewered, which gas mains are not. Con- ering, however, the word "properties" by itself alone and in common meaning, could gas mains be considered as "proper- s" or "a property of the Gas Company?" When talking sewering property, they would not commonly be so understood. we go to the 5th section of the Act, it appears to contain no press or implied definition of "a property." That section ɔws however that it is something capable of being sewered; ıt it is something capable of abutting wholly or partly on a eet, and of having houses or buildings erected upon it, and is erefore certainly land. The great argument for the plaintiff ıs that a company of this description should be rated on the inciple that its property is the undertaking. It was said ıt as all the gas mains are connected with some portion of e company's works, therefore the gas works themselves are bound together; that the moment you get a street with

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sewers laid in it on which any part of the Gas Compa property abuts, the whole undertaking, after a time to be f by the Board, is to be treated as sewered.

The first sub-section of sec. 5 says:—"The Board . . . . ." (His Honor read the sub-section.) It seems to almost incredible that it could have been intended that moment any building used by the Gas Company was foun abut on a street in which there had been sewers laid, notice should become applicable at once to the whole of company's property wherever situated, and although no o portion of it abutted on any street in which there was a se The other sub-sections seem to me only to show that more fu

Speaking for myself, I think that when the first Act varied it was intended to do away with what was felt to great injustice—namely, that every citizen within the metro should be charged annually with the same amount proport ately to his property, whether he had received the full be of sewerage connections or had that only in anticipation; that in the course of preparation of this Act another injus presented itself to those who framed it, and so to Parliame namely, that companies like this were treated in the schem rating for the purpose of sewerage as if they were being r for municipal purposes. The object of this Act was to m people pay for the advantages they actually enjoy as ow from the system of sewerage which is being carried out by Board on their behalf.

A good deal of reliance has been placed on sec. 10 of Act No. 1491. (His Honor read the section.) It has argued that if the interpretation which we have ventured to on this Act is the correct one, Parliament would have diminis the security which was given to the debenture holders, altho perhaps inadvertently. I do not think it is necessary to that at all. The words "Notwithstanding anything in this contained" refer to the amount of one shilling which the Boar permitted to levy, instead of as in certain cases twopence or penny. The word "properties," it seems to me, has there same meaning as in the previous section, and means rate properties for the time being. I do not see any difficulty

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ding that. The property is changing incessantly, and the ırity varies with the properties and their value. On all se grounds I am of opinion, and my learned brothers agree h me, that this appeal should be allowed, and that there uld be judgment for the defendants, with costs.

A'BECKETT, J., concurred.

HOOD, J. The only matter which can be dealt with under 8 of Act No. 1491 is property; and the plaintiffs contend the right which the defendants have of using roads for the poses of their business, not as accessory to their land, but ely for carrying products from one place to another, is perty within the meaning of the Act. That certainly is not primary meaning of the word, and there is nothing in the to show that such a right is property.

Under the *Local Government Acts* there is a very wide nition of property—"occupation of any land whatever"— it is endeavoured by this contention to introduce that e definition into this Act. It was introduced into the Act and abandoned, for that introduction was afterwards ealed. And it is now contended that notwithstanding repeal we have to read the word property as though that nition is still in and put upon it the wide meaning of the *al Government Acts.* I see no reason for so doing. On the rary, there are many reasons, already stated, against it. I some doubt as to the difficulty arising from sec. 10. It seem that the meaning we have put upon the word perty will, though to a very small extent, diminish the ırity of the old bond-holders. But originally they got that ırity upon such rates inadvertently, and now they have lvertently lost it. I think the Legislature had not that in r minds at all. They were legislating for what the ordinary would call property—property which is or may be sewered

Appeal allowed.

Solicitors for the plaintiff: *Fink, Best & Hall.*

Solicitors for the defendant: *Malleson, England & Stewart.*

J. M.

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HOOD, J.

1903
October 7.

CHRISTIE *v.* TEMPLETON *and Others.*

Customs—Commonwealth Customs Act 1901 (*No.* 6), *ss.* 234 (*a*), (*e*), 25
for goods referring to enclosure of other goods—Customs entry omittin
to enclosure—Declaration—Untrue statement—Evasion of duty—Am
information—Alteration of charge.

The defendant firm imported from its London house 5 bales of c
floor coverings, on the invoice for which was the memorandum "Parc
for X. from Y.," X. being the representative of the firm in Melbo
shipping clerk of the defendant firm presented at the Customs Hous
relating to "5 bales of carpets and floor coverings," and giving all t
particulars in regard to them, but making no reference at all to th
parcel; and in a declaration in the form required by the regulations
further declare that the said goods are properly described in this entr
the particulars herein given are true in every respect and in the said
that nothing on my part nor to my knowledge on the part of any other
been done concealed or suppressed whereby His Majesty the Ki
defrauded of any part of the duty lawfully due on the said goods." Su
in applying for delivery of the goods, the shipping clerk drew the atte
Customs official to the memorandum on the invoice, and the parcel
to contain three suits of clothes, a post entry in regard to which
made, and the duty short, amounting to 2*l.* 10*s.*, paid. The defendant
with making a statement which was untrue in certain particulars,
sec. 234 (*e*) of the *Customs Act* 1901.

Held, that the defendant firm was guilty of the offence charged.

Held further, that the magistrate before whom the information wa
bound, if it became necessary, to amend the information so as to
defendant firm with having evaded the payment of duty, and that the
firm was guilty of such offence.

ORDER TO REVIEW.

The defendants were charged, on the inform
Detective-Inspector Christie, an officer of Customs, "
they, on the 24th October 1902, at Melbourne, did, in
declaration indorsed on Customs Entry 274 for certa
which declaration was produced to an officer of Custo
a statement which was untrue in certain particulars co
the *Customs Act* 1901."

From the affidavits of the informant, and the jud
the police magistrate the following facts appeared:—
fendant firm in Melbourne imported certain carpets
coverings contained in 5 bales from the defendant firm in
the invoice for which, in addition to details of the natu
and prices of the goods, had written on its face, referri

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the bales—"Parcel enclosed for Mr. M'Kendrick from Gunn Collie." M'Kendrick was the attorney-under-power and resentative of the defendant firm in Melbourne. The invoice a bill of entry were presented to the manifest clerk at the toms House by one Hugh Bannerman, the shipping clerk agent for the defendant firm. The entry on its face ribed the goods as "five bales carpet floor coverings," ified the marks and numbers on the bales, the invoice value he goods, their value for duty, the rate of duty, the amount uty, &c., but made no reference whatever to the enclosure in of the bales. Endorsed on the entry was a declaration ch was taken before the manifest clerk in the following ns:—

"I, Hugh Bannerman, hereby declare that I am the agent authorized by James Templeton and Co., the owner of the ls mentioned in this bill of entry, and contained in the kages therein referred to, and enter the same for home umption, and that the invoice now produced is the genuine only invoice received by me or by any person to my know-e, or which I expect to receive, of all the goods mentioned in entry, and contained in the packages as marked, numbered, described therein, and that the value of such goods mentioned ich entry and the said invoice, and therein stated as 58*l.* 2*s.* was to the best of my belief the fair and real market value hich such goods were ordinarily sold at the time of ship-t in the principal markets of the country whence they were orted, and without any deduction because of the exportation eof on account of my being the agent, representative, or ner of the manufacturer, seller, consignor, or exporter eof, or for any special consideration whatever other than as would be allowed in the ordinary course of trade to any chaser for export thereof, and that the price paid or to be for the goods, and stated in the said invoice, is the usual ordinary price paid for such goods at the time of shipment the country whence they were exported. And I further are that the said goods are properly described in this entry, that the particulars herein given are true in every respect, in the said invoice, and that nothing on my part nor to my

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knowledge on the part of any other person has been done, co
cealed, or suppressed whereby His Majesty the King may be
frauded of any part of the duty lawfully due on the said good

Bannerman, in producing the invoice and entry to the lan
ing-waiter for the purpose of obtaining possession of the goo
drew his attention to the memorandum on the invoice. T
bale in question was opened, and enclosed was a parcel conta
ing three suits of clothes, which were valued for duty at 1
A post entry was passed, and the short duty, amounting to
10*s*., was paid, and delivery was given of all the goods.

Counsel for the informant asked the police magistrate, if
had any doubt as to whether the specific offence alleged had b
committed, to exercise his powers of amendment under sec. 2
of the *Customs Act* 1901, so as to charge the defendants un
sec. 234 (*a*) with "evading payment of any duty which is p
able," but he refused to make such amendment. The magistr
dismissed the information, and this order *nisi* to review
decision was granted on the following grounds:—

(1.) That upon the evidence adduced before the Court
Petty Sessions the defendants ought to have been convicted
the offence charged against them.

(2.) That if the defendants ought not to have been convic
of the offence charged against them, the Court of Petty Sessi
ought to have amended the information by charging that
defendants had evaded payment of duty, and convicted
defendants of such offence.

Cussen to move the order absolute.

Hayes to show cause—Bannerman only had authority
clear goods for the defendant firm, and for no one else. T
declaration, which is in the form prescribed by the regulatio
relates only to goods mentioned both in the invoice and
entry, and is therefore perfectly true. All the goods mention
are contained in the five bales, and the declaration does not s
they are the only goods contained therein. Bannerman w
only seeking to pass the goods mentioned and described. Th
was no effort at concealment. The Customs officials elected

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closure as they would personal luggage, and allowed
y in regard to them, and they cannot now be heard
. By sec. 229 (*p*) of the *Customs Act* 1901 "any
ving concealed therein goods not enumerated in the
be forfeited; and there being this special remedy
applicable.

for the prosecution, knowing that two offences could
ged, asked for a conditional amendment, which was
sed.

—Sec. 239 provides that "all penalties shall be in
any forfeiture." The declaration says—"The
herein given are true in every respect . . . .
g has been suppressed, etc." The declaration is
three particulars—as to (1), the contents of the
he value of the goods; and (3), the amount of duty
he invoice, the entry, and the goods in the bales
orrespond. No intent to defraud is necessary: See
Robert Reid and Co. Ltd. (*a*). Sec. 251 provides
Court shall at all times make any amendment
o determine the real question in dispute or which
desirable." This shows that it is obligatory upon
ate to amend.

J. The defendants were charged with making a
which was untrue in certain particulars, contrary to
s Act 1901, and, on the hearing, the magistrate
he case, giving reasons which I do not quite follow.
nisi was then obtained on the ground that upon the
e defendants ought to have been convicted of the
ged against them, or, if not, that there ought to have
mendment of the information to cover the offence
ed. In my opinion the defendants are wrong on
. I think that the declaration does contain a state-
is untrue. There is some doubt in my mind as to
part of the entry—as to whether the statement
o "the goods mentioned in this bill of entry, and

(*a*) [1902] 28 V.L.R. 82.

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contained in the packages therein referred to" might not limited solely to the goods mentioned, namely, "five b carpet floor coverings;" but at the end there is a furt declaration "that the said goods are properly described in entry, and that the particulars herein given are true in ev respect, and in the said invoice, and that nothing on my p nor to my knowledge on the part of any other person, has b done, concealed, or suppressed, whereby His Majesty the K may be defrauded of any part of the duty lawfully due the said goods." It is clear that there is a statem which was not correct, because it alleged that the packa marked as specified in the entry, contained, as I read document, nothing but the "five bales carpet floor coverin That is, I think, the real meaning of the document, and in opinion no person reading it, and looking at the whole of would presume that there was anything in the packages exc the "carpet floor coverings." As a matter of fact there something in the packages besides the "carpet floor coverin In my opinion there was not the slightest intent to defra but the Act has been violated, and an offence has been pro in the terms charged. But even if that were not so, amendment ought to have been allowed. The magistrate bound by sec. 251 to make the amendment asked for, and evidence shows clearly that the defendants had evaded paym of duty. The only answer made by the defendants' counse the time is an answer which has no bearing on the matter that, on either ground, the defendants should have been c victed. There is nothing to be gained by referring the mat back. I will inflict the minimum penalty of 5*l.*, with co The order *nisi* will be made absolute.

Order absolute with costs.

Solicitor for the informant: *Croker.*
Solicitor for the defendants: *Sharp.*

H. I. C.

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EX *v.* MUNICIPAL COUNCIL OF THE SHIRE OF MARONG, *Ex parte* FILCOCK.

A'BECKETT, J.

1903
May 25.
F.C.
September 1.

ctice—Proceedings to set aside judgment—Consent order—Order not passed and entered—Consent in ignorance of particular fact—Withdrawal of consent—Misapprehension as to terms—Fraud—Jurisdiction of Court to vary consent order.

Proceedings to set aside a judgment must be taken before the judgment is ed and entered.

A consent order, agreed to by the parties in Court after discussion of the case the concurrence of their legal advisers, and with the assent of the Court, ot afterwards be varied on the mere allegation that the consent was given in rance of a particular fact, though it may be clear that, with the knowledge ch fact, neither the consent of one of the parties nor the assent of the Court ld have been given.

A withdrawal from such a consent by one of the parties is only permissible re he was under a misapprehension as to the terms of the bargain, or there been fraud by the other party.

Where the parties, without any misapprehension on their part, and without fraud either on the Court or as between the parties, have agreed to a consent r being made, the Court, provided such order contains no illegality, is bound cord it, and cannot afterwards vary it.

Decision of A'Beckett, J., overruled.

APPEAL from an order of A'Beckett, J., whereby it was ered that an order *nisi* for the issue of a writ of *mandamus* uld be made absolute with costs.

The facts sufficiently appear for the purposes of this report n the judgment of Madden, C.J. (*infra*).

The reasons of the learned Judge for making the order ealed from were as follow:—

A'BECKETT, J. In this case an application was made to me re than a year ago at the instance of Henry Filcock for a *ndamus* commanding the municipal council of the shire Marong to open a closed road. A great number of affidavits e filed for and against the application, and part of them went the applicant being influenced by improper motives with ard to the person who would have to take down or put up ces if the road was opened. (His Honor referred to the ious proceedings which had been taken prior to the delivery his judgment of 12th March 1902, and continued.) The stion as to whether the road was or was not required for

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public traffic being before the minister for his determ
would have made the issue of a *mandamus* improper,
sides were agreed that the matter should stand ov
finality had been obtained as to what the Minister v
with the matter.

The part of the *Local Government Act* 1890
material for the purpose of deciding this contest as
mandamus is the provision in sec. 428. (His Honor
The view which I had formed upon the facts I have sta
the last occasion was that, if it had been left to me wit
consideration as to what the Minister might or might
should have felt bound to grant the application. I
there was evidence to show that it was desirable to
road open. If it was a mere question of balance of con
—whether the persons whose land the road passed or th
who would have to open the road and put up new fenc
suffer more inconvenience—the balance would be in
the person who objected to the road being opened; bu
public interests I thought it desirable that the road sh
in the straight course, and that a substitute should
accepted which would take in two sides of a triangle.
there was a contest, and something to be said on both
thought that the applicant for a *mandamus*, who was
that proceeding to assert his right, should get the cos
mandamus; and but for the fact that the question w
the Minister for his determination, I should have made
absolute, with costs. Then the matter was delay
various causes after there had been a publication
Government Gazette of the decision of the Minis
the road was not required for public traffic, and th
before the parties and before me, it was assumed that th
show—and rightly so—that I ought not to grant the *m*
in the face of that decision. But that still left the qu
costs to be considered. Then the parties came before
the matter was mentioned. Something was said abo
having been an application to revoke the Minister's
but having intimated my view that, the Minister havi
to this decision, I should not grant the *mandamus*, an

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ık it was a case in which costs should be given, it was
ere was no objection to the order taking the shape
ge of the order *nisi* without costs. I regarded it as
hat the parties did not consider necessary to argue
her than an order made by consent; but I must
idavit of Mr. Hyett that it was to be regarded as a
der, and I should deal with it as a consent order to
Then I ceased to hear anything of the matter for
d the order was not drawn up. Then it was after-
overed that at the time this consent was given—at
was giving judgment—a fact had occurred which
pletely have subverted the whole basis upon which
and the parties were proceeding; that in fact the
t Gazette which had been published the day before
contained an effectual revocation of this decision
ister. If I had known that, I should have made the
te with costs, because I thought the applicant was
costs, although there were those facts I have referred
plication. He had established his case, and had been
siderable expense in doing so. Then, the order not
n drawn up, and both sides becoming aware of what
ed, I have to consider the present application.
ıtended that, the order having been a consent order,
urisdiction to alter it, and that it must stand, and I
referred to authorities bearing upon that question;
t consider that the facts which occurred in those cases
ach for any effectual purpose the facts of this case.
vould be something extraordinary if the Court and
proceeding on an absolutely erroneous supposition as
, and presuming they are one way, should be bound
to an order which, if made with knowledge of the
vould have been improper. Therefore I think I have
lisregard the order which I then made. I think I
ction under the peculiar facts of this case. I think
t jurisdiction notwithstanding what has occurred;
hstanding that Mr. Hyett in his affidavit states it
der by consent, I think I may say—"No. I make
der. I was under a misapprehension; the parties

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were under a misapprehension. The consent given under circumstances is not binding, and I have power to make ar order, and that order I make." For the reasons I state, my is that the order be made absolute with costs, except th parties abide their own costs of the application to-day and the other occasion referred to.

Order nisi for issue of writ of mand absolute, with costs.

The grounds of appeal from this order material to this were shortly as follow:—

(1.) That the parties, having agreed in open Court th order *nisi* should be discharged without costs, and the c order having been approved by the Court and never been appealed against or set aside, the learned Judge h jurisdiction to depart from such consent order, and h jurisdiction to make such order *nisi* absolute either w without costs.

(2.) That no facts were shown justifying any departur such consent order, or suggesting or proving any tri mistake, or other reason why such consent order should no been adhered to and enforced.

Cussen for the municipal council of the Shire of M appellant:—The ignorance of the relator, when he agreed consent order, of the merely collateral fact of the Mi decision having been given, did not entitle him to ha consent order altered, any more than his ignorance of any collateral fact would. There was no mistake by either about the matter; but there was a pure bargain, under the shire council on its part was giving up somethin stantial in foregoing its right to costs, while its counsel mo was promising to endeavour to get swing gates erected.

(He was stopped.)

Isaacs, K.C., and *Bryant* for the relator, respondent relator asked for an adjournment on the 19th March to

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of the Minister, but it was refused. When he the making of the consent order, His Honor was misapprehension that the Minister's previous order t, whereas it had been revoked, and was as much as if it had never been made; and, as he was in to do in the interests of justice, and in the proper his discretion in respect of a matter still under his altered the consent order to what he would have all the facts been before him. The Court has the diction to vary its own order before it has been *Warnock* v. *Austin* (No. 2) (*a*). "If consent has o an order by mistake, it may be withdrawn at any the judgment is passed and entered": *Annual* 903), vol. ii., p. 331 *et seq.*; *Rogers* v. *Horn* (*b*); *In ire Company* (*c*); *In re Suffield & Watts, Ex parte Preston Banking Company* v. *William Allsup &*

N, C.J., referred to *Porteous* v. *Oddie* (*f*); *Davis* v. *Attorney-General* v. *Tomline* (*h*); and *Holt* v.

tor was under a misapprehension in thinking that een no decision of the Minister at all in respect of his to revoke. So also was the defendant. In *Mullins k*) it was held "that the Court has jurisdiction to n order made on an interlocutory application by n it is proved to have been made under a mistake, mistake was on one side only." That principle is ere. The Court has jurisdiction to set aside a consent y ground which would invalidate an agreement parties; and mistake is one of such grounds: *d Banking Company Limited* v. *Henry Lister and l* (*l*). That case shows that ignorance of a material a mistake.

28 V.L.R. 632.
26 W.R. 432.
12 Ch. D. 88, at pp. 91, 97.
20 Q.B.D. 693.
1 Ch. 141, at pp. 144, 145.
1 V.L.R. (Eq.) 148.

(*g*) [1880] 13 Ch. D. 861.
(*h*) [1877] 7 Ch. D. 388.
(*i*) [1876] 3 Ch. D. 177.
(*k*) [1879] 11 Ch. D. 763.
(*l*) [1885] 2 Ch. 273, at pp. 275, 276, 285.

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[HOOD, J. Supposing a man consents to a judgment belief that his main witness is out of the jurisdicti afterwards finds that he was and is available as a witn he get the judgment set aside ?]

If the judgment has not been passed and entered th can re-open the matter.

[*Cussen—Elsass* v. *Williams* (*m*) is a direct authorit contrary.]

Though the application was refused in that case, nothing in it to show that in no case is there jurisdictio Court has to be satisfied that the arrangement made the parties is a just and proper one.

[*Cussen* referred to *Harvey* v. *Croyden Union Sanitary Authority* (*n*).]

Counsel referred to *Neale* v. *Gordon Lennox* (*o*).

MADDEN, C.J. In this case two or three very im principles appear, although there does not seem to be a great difficulty in the substance of the appeal itself. Th a public road—surveyed and reserved, and duly proclai the Shire of Marong. One Thomas Connor enclosed the relator, Henry Filcock, a ratepayer, desired to have opened, and he took proceedings to that end. An app had been made to the council of the Shire of Marong to the road not required for public traffic under sec. 428 *Local Government Act* 1890, and the council ado resolution that it was not required for public traffic; that resolution were confirmed by the Minister charged administration of the Act, then there would have been ascertainment that the road was not required for public and consequently it might be kept closed. On the sa that the council of Marong adopted that resolution, the caused an order *nisi* for a *mandamus* to open th which Connor had closed to be served upon the That order *nisi* subsequently came on for hearing

(*m*) [1885] 52 L.T. 39.
(*n*) [1884] 26 Ch. D. 249.
(*o*) [1902] A.C. 465, per L naghten, at p. 472, Lord Lindley, at p.

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., on the 12th March 1902, and after hearing
atisfied that the council had *bonâ fide* arrived
lution which sec. 428 of the *Local Government*
allows it to arrive at. He, however, also
fact that, before those who were applying to the
ve this road declared to be not required for public
ad time to go the necessary step further and have
on of the council confirmed by the Minister, the
or a *mandamus* had been made; and finding that
of a *mandamus* might be an unreasonable inter-
he application to the Minister, His Honor resolved
stage he would not decide the case, but adjourned
that the will of the Minister as to whether
onfirm the resolution of the shire council or not
ertained. The Minister gave two decisions in the
is first decision he rather suggested what his decision
an actually made it; and on the second occasion
his decision in confirmation of the decision arrived
shire council. On the 26th November 1902 the
rmal order to that effect was duly drawn up. On
s as they stood at that time, if it had been convenient
ed Judge below to have resumed his consideration
nisi for a *mandamus*, he would have been bound
it, possibly with costs; certainly to discharge it;
the conditions which would have entitled the
he *mandamus* were disposed of; consequently
si would have to go.

nd March 1903 Mr. Hyett, the solicitor for the relator,
lication to the Minister of Lands that the Governor
might revoke the order which had been made
y the Shire Council and the Minister, declaring
d was not required for public traffic. Presumably
n view of the reiterated suggestion that it was
public traffic. As a matter of fact, on the 10th
the Governor in Council acquiesced in that
and did make an Order in Council revoking the
der of 26th November 1902. On the 18th March
rder in Council was proclaimed in the *Government*

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Gazette. On 19th March 1903 A'Beckett, J., resumed his s
to consider and deal with the order *nisi* for a *mandamus*
that date, although the revocation by the Governor in C
had been made on the 10th March and proclaimed on the
March, none of the parties knew that that had happen
anything whatever about it. Mr. Hyett knew, of course, t
had made an application for revocation on the 2nd M
Apparently he did not pursue the matter closely, or he di
think that it would be so promptly dealt with. At any r
knew nothing more. The other side did not know anythi
all of the matter until the 19th March, when they were
aware that Mr. Hyett had made the application. The he
as I have said, was resumed on that day, and while c
for the relator was arguing, A'Beckett, J., indicated
as things then stood, he was minded to discharge the orde
for a *mandamus* without costs. He had not then hear
other side on that particular occasion, having regard t
Minister's decision confirming the council's resolution;
although the decision suggested by the learned Judge wa
which would have been in favour of that side, because it
discharge the order *nisi*, still they might well have been a
show him that he ought to allow costs. That statement h
been made by the learned Judge, and the other side
possessed then of knowledge which was disastrous to the r
his whole case was gone. He had scarcely any hope of g
anything from A'Beckett, J., except a release from the pa
of costs. In these circumstances it was suggested by co
who was appearing for the shire council, to Mr. Hyett,
consent should be had to discharge the order *nisi* without
—that is practically to adopt the learned Judge's then
on the subject—with the recommendation which counsel t
took to make to the council that it should substitute f
fence which was across the road at that time a swing
which would afford access to those who required for any s
purpose to use the road. Mr. Hyett discussed that matter
counsel, and the result was that they came to an agre
that the bargain referred to should be struck. That being
the learned Judge was informed of it, and His Honor, as h

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duty bound, I think, to do, acquiesced at once, and as a judgment by consent. As a matter of fact that was not drawn up and perfected in the usual way. lowing day—the 20th March—Mr. Hyett ascertained t time that the Order in Council revoking the order ovember 1902 had in fact been made and proclaimed e 19th March, and on the 21st March he gave notice to prevent the entering up of His Honor's order larch. That having been done, A'Beckett, J., heard ation of which that notice was the foundation, me to this conclusion—that as in fact on the 19th re had been then existing an Order in Council, which, to him, would have given him a discretion to make for a *mandamus* absolute, he had been under a ension, and that as neither of the parties knew about that Order in Council on that day, they had their bargain as to the consent order also under a ension; and His Honor thereupon made absolute the for a *mandamus*, with costs.

he present appeal is from that order, and the of the appellant is this—that on the 19th March a fair bargain arrived at between the parties who were ubt, to some extent, at all events, as to what would be in these proceedings; and it is said that that consent not be withdrawn from unless it can be shown that y or both parties acted under what the law calls a ension of their rights. A number of authorities cited to us, in which the principle is clearly laid t, whatever may be done in the way of setting onsent judgment, the action to set it aside must before the judgment is passed and entered. So clear enough. The cases then proceed to suggest judgment of that kind is not passed and entered, may have authority to rehear it and deal with Authorities have also been cited to show that a right in a party to such a consent order to that consent in certain circumstances; but the Court t, whatever the rights of withdrawal may be, there

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must not be an arbitrary withdrawal, and we have theref consider whether His Honor was right in supposing th was such a misapprehension as would give that ri withdraw.

We think that there was no misapprehension wh The two parties were in peril. Anything might happe man in litigation, as is fairly well known. Each part something to say on his own side—each had something t for, and the worst might befall either of them; and resolved that, in the circumstances, the best thing was th order *nisi* should be discharged without costs, and the agreed to that course being taken. We think that it is r apprehension on the part of one of the parties that he h looked as studiously as he might have done into hi rights, and has omitted to discover a fact which, if disco would have defeated his adversary. If there be a fact w knowledge of the existence of which he chooses to acc bargain which is offered to him, we think that that circum does not allow him to say—"If I had only taken care to myself of something which had happened I would neve consented to this." We think that a withdrawal in such c stances would be a most improper withdrawal. If after a has consented to a judgment he finds that he would hav better off if he had not consented, for all that he will be h it. The misapprehension which allows a withdrawal by party from such a consent ought to be something in the nat a deception by the other party, or a misapprehension as to the terms of the bargain were; so that he thought they one thing when they really meant another, and such misu standing was to his disadvantage. The mere fact th might have been better off if he had known of any part fact is no answer, and we therefore think that, so far parties to this consent order are concerned, the relator h right to withdraw from this consent.

Then it is said that the learned primary Judge was at l to take the matter up on his own account; that inasmuch was a party to the consent order, which possibly and pro he would not have assented to if all the facts had been k

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e was entitled to say—"I was deceived, and, being I will have none of it. I will go back, and will make which I would have made had I then the knowledge nted to me." We are of opinion that this is not the which, on the civil side, a Judge can take up. hing to him if the parties consent to a bargain rns out to be disadvantageous to one of them. y make any bargain they think fit. That is their f either party deceives the Judge by some fraudulent false information, the Judge may say—"I have been by such trick or information. The Court will not be a matter of this kind. I will go back, and will not party who has committed a fraud on the Court to have of that fraud." In cases of that kind he may do so to he Court. But where the parties themselves are with the terms of the bargain when it is made, and o fraud on the Court, and there is no illegality in the lf, the Judge has nothing to do with the matter but to judgment agreed upon. In the present case none of litions present themselves, and we think therefore that d Judge was not called upon for the protection of the the justice of the proceedings to insist that the consent de, and the ordinary course of justice proceed. We t where His Honor was called upon to take any such where the Court ought to constitute itself a re-actor ngs right, that he had a right to exercise a discretion, he could review it. But we think that that particular , whatever its limits are, does not arise in this case, where a consent order has been made, the question as to the consent may lawfully be withdrawn or not is a hich a court of review has a right to look at to see exercise of discretion is a judicial exercise. We think ll these reasons the appeal should be allowed, with he order *nisi* for *mandamus* will be discharged with

OYD, J. In this case the learned primary Judge has very precise terms the reason why he consented to

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permit a rehearing after the parties on the argument of order *nisi* before him had consented that that order shoul discharged without costs. He says this:—"I think it woul something extraordinary if the Court and parties, proceedin an absolutely erroneous supposition as to the facts, and pre ing they are one way, should be bound to adhere to an o which, if made with knowledge of the true facts, would been improper. Therefore I think I have power to disre the order which I then made. I think I have jurisdiction u the peculiar facts of this case. I think I have that jurisdi notwithstanding what has occurred; and notwithstanding Mr. Hyett in his affidavit states it was an order by conse think I may say:—'No, I will make another order. I under a misapprehension; the parties were under a misap hension. The consent given under those circumstances is binding, and I have power to make another order, and other order I now make.' The rule with respect to setting orders which have been made by consent, or by way of com mise, is very shortly laid down in the head-note to the ca *Davis* v. *Davis* (*p*), which reads:—"A compromise ag to by parties in Court, after discussion of the case, the concurrence of their legal advisers, and with the a of the Court, cannot afterwards be varied on the allegation that the consent was given inadvertently wit evidence of mistake or misapprehension." If that mistak misapprehension had existed under which the learned J evidently supposed he had been labouring I should on authority have agreed with him. But in my opinion the evidence before us it appears that no mistake was by either of the parties, and there was no misapprehe at all. Neither of the parties knew one thing—nar whether the application which had been made for revoca had been granted or refused, or whether any decision been given about it or not. They were not under belief, and had no ground for believing, that it had been decided any more than they had ground for belie that it had been decided. They were in ignorance on

(*p*) 13 Ch. D. 861.

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ether, and as I said during the argument, and I even more strongly now, it is an absurdity to e of that fact a misapprehension. That is not the They were both conscious that they did not know plication had been entertained or decided. The ge himself appears to me to have been wrong natter was mentioned to him and when he was rongly that he had been mistaken because he had here was an application to review the former order ter and he did not know the result of it. I think g in his own mind in coming to the conclusion that ny ground for supposing that no order had been e were no grounds for such a belief. There was Mr. avit that the application had been made ten days earing, and there was plenty of time for one side or have ascertained what the result was with reference ation. They did not do it. One side—that is, the ew nothing about it until they came into Court. de had plenty of time to find out what the facts

reason I concur in the judgment of the Court.

I concur.

Appeal allowed, with costs. Order nisi for mandamus discharged, with costs.

for relator: *B. P. Rymer* (for *Quick, Hyett & digo*).

s for the council: *Wisewould, Gibbs & Wisewould Kirby & Woodward,* Bendigo).

H. I. C.

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HOLROYD, J.

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September 2, 8, 21.

[PRACTICE COURT.]

MASCIORINI *v.* DOWLING.

Mines Act 1890 (*No.* 1120), *ss.* 28, 29, 33—*Mines Act* 1897 (*No.* 1
Residence area, registration of—Transfer—Complaint for can
registration of residence area—Jurisdiction of warden.

Where the assignee of an existing residence area is registered as t
it, there is no break in the title, but where a piece of Crown land, wh
its residential qualification, is again occupied as a residence area, ther
in the title.

A complainant applying under sec. 33 of No. 1120 for the canc
residence area may, at the same time, apply to have himself register
of such residence area, and the warden, under sec. 15 of Act No. 1514,
that he be so registered, and such direction may be given either in t
cancellation or by any subsequent order.

To render such last-mentioned direction effectual, the ground mu
up afresh as a residence area, and any direction by the warden shou
conditional upon the complainant perfecting his title within a reaso
which the warden may fix.

Semble, the lawful holder of two residence areas may apply to th
cancel the registration of a third area, although he may not l
registered for it as a new residence area after cancellation.

SPECIAL CASE stated for the opinion of the Supre
by the warden at Bright, in the mining district of Beec

The special case was as follows:—

"This case was commenced by summons under sec.
Mines Act 1890 (No. 1120). By the summons, t
plainant, the holder of a miner's right, sought
cancelling the registration of a certain residence area
ground that there was no habitable dwelling erected
and that there had not been a habitable dwelling
erected for a period of three consecutive months pri
date of the summons. The complainant further sou
he be registered as the holder of such residen
The said summons came on for hearing before me a
on the 27th November, 1902, when Mr. Fox appeared
complainant and the defendant appeared in person.
adjourned hearing Mr. Gaunt appeared for defendant.

"The following facts were proved to my satisfactio

"1. That the original registration of the residence

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20th April, 1898, in the name of one William F.

a renewal registration of the said area took place
time by Beveridge and his transferee, one G. H.
last of such renewals being on 8th October, 1901.
on the 7th October 1902 the said Chatfield trans-
area to the defendant, who was the holder of a
, and the said transfer was registered at Bright on
in the name of defendant.
there was no residence on the said area when
ok over a transfer of it, and that no residence had
from January 1902 up to the date of the summons
iod of about ten months.
prior to January 1902 there had been a residence
which had been removed.
according to the evidence of the mining registrar
nly one registration of residence area in respect of
in dispute. The others were transfers and re-
.
complainant was, on the date of the issue of the
rein (but not on the date of the hearing), the holder
esidence area in the same mining division.
hearing arguments, I consented to state a special
opinion of the Supreme Court on certain questions
I intimated that, in my opinion, there had only been
ion of the residence area, namely, that of the 20th
that when defendant accepted a transfer he took
th its existing defects; and that I would find in
complainant, subject to direction on the questions

estions of law reserved for the Supreme Court are

the original registration of the 20th April 1898 the
tion of the residence area?
the registration of transfer of the 7th October 1902
t a new registration of the area such as to entitle
the benefit of the four months mentioned in sec. 33
120?

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"3. When defendant obtained a transfer from Chatfi 7th October 1902, did he take the title with its existing de

"4. Was complainant, by reason of his holding a residence area in the same mining division on the date issue of the summons herein, debarred from applying f cancellation of the residence area—the subject of this case

"5. Was I right in ordering that the registration residence area be cancelled, and that such residence a registered in the name of complainant?

"The decision of the warden was as follows:—'I fi there was a time four months after the registration of the mentioned residence area when no habitable dwellin erected thereon, and that there has not been a habitable ing erected thereon for three consecutive months prior date of the complaint herein. I adjudge accordingly, and that the registration of the said residence area be cancelle that such residence area be registered in the name of con ant. I further order that defendant be allowed one mont this date to remove any building materials, fencing, or property belonging to him from the said residence area.'

"Given this 15th day of January 1903.

"JAMES ROWA

Paul, for the complainant, cited *Reid* v. *Gunn* (a *Vial* v. *Allender* (b).

Gaunt, for the defendant, cited *Armstrong's Law o Mining* (2nd ed.), p. 79; *O'Sullivan* v. *Clarke* (c); *Mul Walhalla G. M. Co.* (d); *Warrior G. M. Co.* v. *Cotter* (e *Weddell* v. *Howse* (f).

Cur adv. v

HOLROYD, J. I am not sure that I have quite grasp facts as stated by the warden in the special case. I unde

(a) [1887] 13 V.L.R. 723.
(b) [1897] 23 V.L.R. 516.
(c) A.R. 2nd December 1868.
(d) A.R. 20th May 1868.
(e) [1866] 3 W.W. and A'B.
(f) [1882] 8 V.L.R. (M.) 4 49, 50.

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an that a portion of unoccupied Crown land was duly
: by Beveridge, and registered in his name on the 20th
398; that this area was transferred by Beveridge to
and Chatfield was registered as the holder of it on the
er 1901; that it was again transferred by Chatfield to
dant Dowling, and defendant was registered as the
t on the 7th October 1902; that previously to January
e had been a habitable dwelling upon the said area,
: removed; and that from January 1902 to the date of
ons in this suit, 21st of November 1902, there had not
habitable dwelling upon it. When the warden speaks
gistration I presume he alludes to the registration of a
pant as holder of an existing residence area, as dis-
l from a new registration of a portion of Crown land
been previously a residence area, but has ceased to be
son of its former registration having been cancelled.
assignee of an existing residence area is registered as
: of it, there is no break in the title. When a piece of
nd which has, so to speak, lost its residential qualifica-
ain occupied as a residence area there is a break. The
on of the *Mines Act* 1890 shows clearly that the regis-
the area and of the holder of the area are different
That section says:—"No person shall be entitled to
y land on any goldfield as a residence area unless such
l for the time being be registered by the mining
or other proper officer of the mining district in which
is situate and unless such person shall be registered as
r of such area and the number of the miner's right or
icence by virtue of which he is entitled to occupy such
lso registered."

are therefore, as I read the section, three requisites
ght to occupy: First, the land must, at the time when
: is asserted or defended, appear upon the register as a
area by an entry of the proper officer to that
Secondly, the person claiming to be so entitled must
pon the register as the holder of the area; and,
the miner's right or business licence by virtue of
holds it must also be registered. The 33rd section of

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the Act under which this suit was instituted directs that, any time after four months from the registration of a resi area it shall be proved to the satisfaction of any warder there is no habitable dwelling thereon erected, and that has not been a habitable dwelling thereon erected for a peri at least three consecutive months, such warden shall mal order that the registration of such area shall be cancelled such registration shall thereupon be cancelled by the m registrar or other proper officer, and the land so registered on such cancellation cease to be a residence area. The months mentioned in the section are to be reckoned fro registration of the area, which in the present case would be the 20th of April 1898, on which day, as stated in the war summons, the area No. 64 first appeared in the regist residence areas at Bright. It having been proved to the war satisfaction at the hearing of the said summons on the 27 November last, when the period of four months had long expired, that there was then no habitable building standi the area, and had not been any for upwards of three consec months, the registration of the area had, according to the ex terms of the Act, become subject to cancellation. The plainant, Masciorini, however, not only sought to have registration of the parcel of Crown land then constit residence area No. 64 cancelled, but also to have himself r tered as holder of it, and by virtue therefore of sec. 15 of *Mines Act* 1897 the warden was empowered to direct th should be so registered. This direction might be given eith the order of cancellation or by any subsequent order, b render it effectual the ground would have to be taken up a as a residence area according to the bye-laws. It is diffic conceive what else could be the object or effect of such a d tion but that of conferring upon and preserving to the succe complainant in the suit the first right to occupy the va ground as such new area. The warden's order, on being lo with the registrar, would prevent any third party from mar out the vacant ground or any part of it effectively for purpose until the successful complainant had had the opportu of going into possession of it and perfecting his title by get

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ınd registered as a new residence area. In my opinion den would of necessity be justified in making his order stration of the complainant as holder conditional upon plainant's so perfecting his title within a reasonable ich the warden might himself fix.

warden has found that at the date of the issue of the s the complainant was the holder of another residence the same mining division—that is, in the Buckland of the mining district of Beechworth. By sec. 29 of the *ct* 1890 any person is permitted to hold under a separate right or business licence one residence area besides that h he resides, or resides and carries on business, provided two are not situated within ten miles of each other. to be implied therefore that in this instance the two e areas were within ten miles of each other. But, h as before the hearing of the summons, and therefore ily before any order could be made upon it, the com- had ceased to hold any residence area, there was in sec. 29 to prevent him from becoming the registered f a new one. I should add, though I need not decide t, that I can see no reason at present why the lawful f two residence areas could not apply to the warden to he registration of a third area, although he could not take up the site, or get registered for it as a new e area, after cancellation.

the foregoing explanations, I answer the questions sub- or the opinion of the Supreme Court as follows:—

'as the original registration of the 20th April 1898 the istration of the residence area?

ver: Yes.

'as the registration of transfer on the 7th October 1902 ıdant a new registration of the area such as to entitle ıt to the benefit of the four months mentioned in sec. 33 No. 1120?

ver: No.

'hen defendant obtained a transfer from Chatfield on the ober 1902 did he take the title with its existing defects?

ver: Yes.

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4. Was complainant, by reason of his holding a residence area in the same mining division on the date issue of the summons herein, debarred from applying f cancellation of the residence area the subject of this case?

Answer: No.

5. Was I right in ordering the registration of the re area to be cancelled, and such residence area be regist the name of complainant?

Answer: Upon the facts stated the warden would b in ordering the registration of the residence area No. 6 cancelled, and also in directing that the complainant sh registered as the holder of a new residence area cover ground rendered vacant by the cancellation, conditionall the complainant's procuring the same to be registered pursuant to the bye-laws of the district within a rea time to be fixed by the warden.

Solicitor for complainant: *M. G. Fox.*

Solicitor for defendant: *C. H. Gaunt.*

W. I

F.C.

1903

November 4.

FORBES *v.* BUTLER.

Vendor and purchaser—Contract for sale of land—Transfer of Land (No. 1149)*—Production of certificate of title in vendor's name.*

Where, in a contract for the sale of land under the *Transfer of Land* reference is made to certificates of title for the said land, and the con Schedule 25 of the Act are made applicable to the contract, the vend full compliance with the terms of the contract by producing the cert title referred to although they are not in his own name.

Where a vendor sells land under the *Transfer of Land Act* he is en reasonable time within which to produce a certificate of title in his o and the purchaser is not entitled to rescind the contract by reason on the time of the sale the certificate of title was not in the vendor's own

The case of *Stoddart* v. *Woods* ([1889] 15 V.L.R. 457), in so far as i to lay down the general rule that a vendor is bound to produce a ce title in his own name when called upon to do so, overruled.

APPEAL from the judgment of Hodges, J.

The plaintiff, Donald William Forbes, sued the de R. H. Butler, claiming damages for breach of contract

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and, and alternatively for a rescission of the con-

articulars delivered by the plaintiff stated that the did not produce any certificate of title in his own uant to the contract or at all; that the defendant, at f the contract, was not the registered proprietor of the acted to be sold. The defendant did not on demand the time required by the contract, produce a certificate his name, and by the contract it was provided— all in all cases and respects be considered the essence tract."

vidence showed that by a contract in writing dated ch 1903, Messrs. C. J. and T. Ham, as agents for Iarding Butler, sold to Donald William Forbes certain e contract, so far as is material, was as follows:—

he undersigned, C. J. & T. Ham, as agents for R. H. e vendor, do hereby acknowledge that we have this o Donald William Forbes, of Toorak, all that piece of g a frontage of 51 feet to Park-street, South Yarra, of 188 ft. 5 in. on the one side and 188 ft. 4½ in. on side, be the said measurements all or any a little more ether with the buildings and erections thereon, known , as in the occupation of Miss Clark under a monthly nd being the land described on certificate of title, 713, folio 342,506, and volume 1881, folio 376,197, at price or sum of 1300*l.*, and under and subject to the of sale hereinafter mentioned or contained.

I the said Donald Wm. Forbes do hereby acknowledge ve this day purchased of and from the above-named e property above described or referred to at or for the um above mentioned, and under and subject to the of sale hereinafter mentioned or contained, and I omplete the said purchase in accordance with the said "

the conditions of the contract were the following:— conditions in table A of the *Transfer of Land Act* l apply to this contract with and subject to the and modifications following.

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"6. Time shall in all cases and respects be consid essence of this contract."

The certificates of title mentioned in the contract we name of John Barker Blackbourne. Butler was, on t August 1896, appointed by a deed of assignment truste benefit of the creditors of Blackbourne, but the land in was not transferred to Butler. At the date of the con land was subject to a mortgage by Blackbourne to the I Mortgage Bank of Victoria Limited.

On the 24th March 1903 the plaintiff's solicitor att the Land Mortgage Bank and had produced to him certificates mentioned in the contract. By letter of t date a demand was made for the production of certif the vendor's own name. The defendant's solicitor infor solicitor for the plaintiff on the 26th March that he c him a transfer from the Land Mortgage Bank under tl of sale in its mortgage, and by letter of the 27th M plaintiff was informed that title in the name of the d would be obtained in a few days; to this letter a reply refusing to wait, and threatening to issue writ. Aft further correspondence the defendant's solicitor waited plaintiff's solicitor with the certificate of title in the the defendant, but which was not yet registered, stating was on his way to register it, but the plaintiff's solicitor did not wish to see it, and on the 7th of April the issued. The title of the defendant was, shortly after of the writ, duly registered.

After arguments the following judgment was deliv Hodges, J.:—

HODGES, J. In this case the plaintiff entered into a on the 23rd March 1903, for the purchase of certain he now seeks to have that contract rescinded, and damages for breach of it. The claim for rescission and is based upon the view that by the contract the d contracted that he had a certificate of title in his own n that he would, practically upon demand, produce a cert title in his own name, and the questions I have to deter

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or not under this contract the vendor has contracted
had a certificate of title in his own name, and whether
ificate of title which, under the conditions, he undertook
ce, is a certificate of title in his own name. A decision
ome years ago has been referred to in which I held that
ificate of title referred to in the contract was a
e of title in the vendor's name. I am not at present
to say that that decision was wrong. I am not as clear
uld like to be that it was right. But on the same
as at present advised, I should follow that decision,
upon the ground that I am not satisfied that that
was wrong.

this contract is of a totally different character. It
at "We the undersigned, C. J. & T. Ham, as agents
I. Butler, the vendor, do hereby acknowledge that we
day sold to Donald William Forbes, of Toorak, all that
land having a frontage of 51 feet to Park-street, South
y a depth of 188 feet 5 inches on the one side and 188
nches on the other side," and it then goes on—"and
e land described on certificate of title, volume 1713, folio
and volume 1881, folio 276,197." Now there are two
ertificates of title referred to in the contract. It is not
hat they are in the name of the vendor, and if the
verba relata inesse videntur is to apply, I must take it
se certificates of title are set out at length in the
At any rate the purchaser is told "those are the
es of title, you may see them if you like." So, when I
he conditions I have to remember that in the contract
certificate of title is referred to. When in clause 3 of
Schedule it is said "the certificate of title shall be
," that is made one of the conditions of the contract.
actically take the contract, which says "This is the
described in a particular certificate of title," and when
er says "The certificate of title shall be produced," I
nd it is the certificate of title previously referred to and
other. There ought not to be, and *primâ facie* there
ot be at the same time, two certificates of title in
e for the same property, and therefore the certificate of

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title referred to in the conditions must be the ce
referred to in the contract. That certificate of title
alleged to be, nor contracted to be, nor suggested t
certificate of title in the name of the vendor. I am t
clear that in this case the vendor did not contract
certificate was in his own name, and that the certifica
he undertook to produce under clause 3 of the 25th
was not a certificate in his own name.

Certain other suggestions have been made in the c
the argument that the vendor had not got a title of a
That is not the allegation in the particulars, and I do n
this is a case in which I should be seeking to find some
not alleged by the plaintiff at the time proceedin
commenced, which, if properly put forward, would hav
ground upon which he might have got his contract r
He appears very suddenly to have repented of his barg
to be keenly desirous of rapidly getting out of it, an
taking every objection he could to get out of it. A
opinion those objections are not well founded, the plaint
take the consequences. Those consequences are that th
be judgment for the defendant, with costs.

From this judgment the plaintiff now appealed.

Higgins, K.C. (with him *Calder*) for the appella
purchaser is entitled to have the full benefit of the p
which the *Transfer of Land Act* was intended to afford in
with land under the Act. The Act recognizes only
between a registered proprietor of land and his purch
the purchaser, in order to protect himself, must deal
proprietor alone. The vendor here has contracted to p
title in his own name, and it is clear that the cond
Schedule 25 of the Act, clause 3, point to the produc
certificate of title in the vendor's own name. Time was
the essence of the contract, and the purchaser has
requisitions within 14 days after the sale of the land
vendor does not produce a title in his own name at once,
purchaser cannot make requisitions until he has so d
the 14 days' would elapse, and the purchaser loses his

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sitions. There is no provision in the Act for any title. In the case of *Stoddart* v. *Wood* (*a*) it was Hodges, J., that the vendor must on application ertificate of title in his own name, and would break in not so doing. Sec. 94 shows that though the n its face may be in the name of the original pro- ndorsement of transfer upon it is to give it the effect ertificate, and though the contract may refer to the tificates the purchaser is entitled to have, the vendor ce those certificates with the requisite indorsement in ne. See also sec. 89.

referred to the following cases:—*Davis* v. *Wekey* (*b*); *ash* (*c*); *Hoggart* v. *Scott* (*d*); *Weston* v. *Savage* (*e*); *James* (*f*); *Brewer* v. *Broadwood* (*g*); *Re Bryant ngham's Contract* (*h*); *Bellamy* v. *Debenham* (*i*).

and *Guest* for the respondent were not called upon.

D, J., delivered the judgment of the Court [HOLROYD, and HOOD, JJ.] We think that the judgment of should be sustained. The argument of the plaintiff d upon his construction of the contract, according to efendant, upon being requested to produce a certificate is own name to the property which was agreed to be und to have produced it, and not producing it, the s entitled either to sue for damages for breach of the to have the contract rescinded. We think the cer- title which were produced were the only certificates ch the contract required the vendor to produce. Those were specified in the contract by number and by vere the only existing certificates of title to the two land which unitedly formed the estate agreed to be is sufficient to determine this case, and decide the lismiss the appeal. The certificates were produced d the plaintiff did not pretend to say—in fact, he

15 V.L.R. 457.
3 V.R. (E.) 1.
35 Beav. 167.
1 Russ. & My. 293.
10 Ch. D. 736.
(*f*) [1882] 8 V.L.R. (E.) 188.
(*g*) [1883] 22 Ch. D. 105.
(*h*) [1890] 44 Ch. D. 218.
(*i*) [1891] 1 Ch., p. 420.

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always adhered to the contrary view—that he was n
requisitions on title when he demanded that certi
should be produced in the vendor's own name; his
argument was directed to establish the point that he
not making requisitions, and I quite agree with him about
he was not. He was entitled, from the case cited, *Matth*
James (*k*), to call for the production of the certificates of
that is for the certificates referred to in the contract,
the production of title generally, which would include
cates in existence, and then after that he was entit
fourteen days' time for the purpose of making requis
Supposing his demand for the production of a cert
in the vendor's own name could be treated as reasonabl
the vendor certainly would be allowed a reasonable ti
obtain such certificate, or, in other words, reasonable ti
obtain a title under the *Transfer of Land Act* in his own
The clause to the effect that time should be of the essence
contract, no time being mentioned in the clause, can o
interpreted to mean reasonable time, and therefore the def
should have had reasonable time. According to the facts
case the defendant did within a reasonable time actually p
a title in his own name. The case of *Stoddart* v. *Woods*,
previously by Hodges, J., has been referred to, and the pr
of that judgment, which he himself has since doubted, ha
called in question. It seems to lay down a general prop
of law that where land under the *Transfer of Land*
been sold the vendor is bound to produce a title in hi
name. In the particular case we think the Judge was rig
we do not agree with the rule laid down in those general
A man may have a perfectly good title although at the n
he has not a title under the Act, but he may be in such a p
that he can immediately get the title; he may be able to
an immediate transfer to himself, and may also be pr
against any other transfer being made contrary to his ri
his power to lodge a caveat. It would be a dangerous d
to introduce, just because a man who has the full abi
confer a title on his purchaser does not happen, at the n

(*k*) 8 V.L.R. (E.) 188.

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FORBES
v.
BUTLER.
Holroyd, J.

o have the title in his own name, that the purchaser
ble to turn round and say that he will rescind the
referring to the clause as to the purchaser having
nd in requisitions, I wish to make it clear that the
f the certificate of title may be called for at once,
his particular case all that the defendant could give
ly produced on the day after the date of the sale,
lly 14 days were allowed for making requisitions.
vill be dismissed with costs.

for appellant: *Crawford & Ussher.*
for respondent: *a'Beckett & Chomley.*

W. H. M.

BUCKINGHAM *v.* WEATHERUP.

HOLROYD, J.
1903
Sept. 2, 7, 8.

ecution of Process Act 1901 (*Commonwealth*) (*No.* 11), *ss.* 3, 4, 11,
iage Act 1890 (*No.* 1166), *s.* 42—*Desertion of illegitimate child—*
e—Writ of summons issued out of a Court—Judicial and minis-
-Service in another State—Jurisdiction.

issued by a justice of the peace under sec. 42 of the *Marriage*
rit of summons within the meaning of sec. 3 of the Commonwealth
ecution of Process Act 1901 (No. 11); but it is not a "writ of
l out of a Court," and cannot therefore be served in another State
that Act.

O REVIEW.

nplainant, Esther Buckingham, had made a com-
ath to a justice at Melbourne, under sec. 42 of
ge Act 1890 (No. 1166), that the defendant John
of Perth, Western Australia, "did at Melbourne
desert his illegitimate child." The justice thereupon
summons under the said section to the defendant,
him to appear at the Court of Petty Sessions at
to be dealt with according to law. This summons,
indorsed under the *Service and Execution of*
1901 (No. 11), for service in Western Australia, was
the defendant in that State. On the return of the
he defendant did not appear in person, but his
nounced that he appeared under protest to object to
f service and to the jurisdiction on a number of

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HOLROYD, J.
1903
BUCKINGHAM v. WEATHERUP.

grounds which are not material to this report. After a of adjournments the justices announced that they were with the proof of service. Subsequently the solicitor defendant announced that he appeared under protest, b he still relied on his objections to the jurisdiction.

At the hearing evidence was called on behalf of th plainant, the solicitor for the defendant cross-examini witness.

The Court made an order that the defendant should p per week to the support of the child, with 5*l.* 5*s.* costs order *nisi* to review this decision was obtained on a nu grounds, the only one material to this report being:—

"That the Court of Petty Sessions had no jurisdiction t the said order, inasmuch as—(*a*) the complaint herein suit within the meaning of the *Service and Execution of Act* 1901 (No. 11); (*b*) the summons herein is not a summons issued out of any Court, and is not the proce Court."

Moule for the complainant to show cause—The sum only a mode of bringing a defendant before the Court. A not issued by the Court, it is the process by which a C Petty Sessions compels the attendance of a defendant, that sense it is the process of the Court. As a matter of succeeded in its object, for the defendant was represented return of the summons, and various objections were ta his behalf. In any case the objection was waiv appearance. Court includes a Justice of the Peace judicially (sec. 3).

He referred to *Dixon* v. *Wells* (*a*); *Ray* v. *Jus Melbourne* (*b*); *Boyle* v. *Sacker* (*c*); *Fry* v. *Moore* (*d*); *F* v. *Ryan* (*e*).

Macfarlan to move the order absolute—The power Federal Parliament to legislate in regard to the ser process out of State is defined by sec. 51, sub-sec. 24,

(*a*) [1890] 25 Q.B.D. 249.
(*b*) [1891] 17 V.L.R. 186.
(*c*) [1888] 39 Ch. D. 249.
(*d*) [1889] 23 Q.B.D. 395.
(*e*) [1902] 28 V.L.R. 279.

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alth Constitution Act. It was in pursuance of the
e given that the *Service and Execution of Process*
(No. 11) was passed. Whatever the word "Court"
e *Constitution Act*, sec. 51 (24), it must mean the
e *Service and Execution of Process Act.* The
alth Parliament has no power to legislate for the
of a State of process which is not the process of a Court
meaning of the *Constitution Act.* Even looking
Service and Execution of Process Act, it defines a
clude a Justice of the Peace acting judicially. But
a summons is a mere ministerial act. It is an act
f sessions, and in performing it the Justice is not
cially. Sec. 42 of the *Marriage Act* 1890 says that
may issue *his* summons. It is the summons of the
of the Court of Petty Sessions.

Cur. adv. vult.

September 8.

D, J., delivered the following jndgment:—This was
isi to review an order of a Court of Petty Sessions
rne whereby it was ordered that the defendant
should pay 10*s.* per week by fortnightly payments,
been held to have deserted his illegitimate child.
ler to review was obtained on a number of grounds,
of them at least I think it can be sustained. Most
ers, at any rate, I think are insufficient, but I need
them. Sec. 42 of the *Marriage Act* 1890 provides
n any father deserts his children whether illegitimate
wedlock or leaves them without adequate means of
complaint thereof be made on oath to any justice
by the mother or any reputable person such justice
his summons to such . . . . father to show
he should not support his . . . . children."
the *Service and Execution of Process Act* 1901 (No
an Act to provide for the service and execution
t the Commonwealth of the civil and criminal process
dgments of the Courts of the States, the term "writ
ns" is defined to include "any writ or other mesne
which a suit is commenced or of which the object is
the appearance of any person against whom relief is

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HOLROYD, J.

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sought in a suit or who is interested in resisting such
A summons issued by a justice under sec. 42 of the *M*
Act would, I think, be included under the definition ther
of a writ of summons. It is quite clear in that section t
expression "mesne process" is not used to signify wha
real or technical meaning—namely, an intermediate pr
something which is executed after the suit has been com
or after the proceedings have been commenced; but it
apparently to denote any process the object of whic
require the appearance of any person against whom
required, or which is resorted to afterwards. And as t
"suit," which is defined in the same section, is in my
sufficiently wide to cover any original proceeding
parties, and when a father is brought before justices un
42 of the *Marriage Act* 1890 for desertion of his illeg
child, the parties are the child on the one hand and the
on the other, that is an original proceeding between
But when we come to the service of writs of summon
provides that "a writ of summons issued out of any
record of a State or part of the Commonwealth may be
on the defendant in any other State or part of the C
wealth."

This summons, assuming the service to have been va
served in Western Australia. It was issued in Victori
question then arises whether it can be said to have bee
out of any Court of record. I think it was not issued
any Court at all. The expression used in sec.
the *Marriage Act* is "such justice may issue *his* summon
means of that summons the parties are brought before
of Petty Sessions, but the summons does not issue out
Court, and the justice is performing a simple ministeri
For that reason, I think that one at least of the grou
which the order *nisi* was obtained should be upheld. Th
of the justices will be set aside with costs, and this ord
will be made absolute with costs.

Order abso

Solicitor for the complainant: *Lyle.*

Solicitors for the defendant: *Rigby & Fielding.*

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[IN CHAMBERS.]

HOOD, J.

1903
October 13, 14.

Y *and Another v.* UNION BANK *and Others.*

ion—Writ of fi. fa., form of—Joint creditors under order of debtors under order of Court—Order for issue of writ of fi. fa. creditor against one joint debter—Irregularity—Application to set

i facias should accord in all respects with the judgment or order ce.

re, that where an order for the payment of costs had been made o defendants jointly against two plaintiffs jointly, an order of such defendants for the issue of a writ of *fieri facias* against tiffs was irregular, and should be set aside.

was commenced in 1890 by Thomas Crowley and patrick against the Union Bank of Australia and cVitty and Joseph Foster and others. The action nued in 1892. In the course of the action two sts against the plaintiffs were made in favour of the IcVitty and Foster jointly.

September 1903 the amount due under these orders, at 6*l.* per cent. per annum, was 394*l.* On that endant McVitty obtained from Holroyd, J., an *ex* under Order XLII., r. 23, "that the said Alexander t liberty to issue a writ of *fieri facias* in this action abovenamed plaintiff, Thomas Crowley." The support of the *ex parte* application stated that the rs for payment were in favour of McVitty and that the plaintiff Fitzpatrick was dead. The con- graph was as follows:—"I desire to issue a writ of action directed to the Sheriff to levy the said sums of the real and personal estate of the said Thomas

now applied on summons to set aside the order of ber 1903, on grounds that sufficiently appear from ts and judgment.

r Crowley in support—The application for leave to ion should have been upon summons and not *ex*

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HOOD, J.
1903
CROWLEY
v.
UNION BANK.

parte: Hammon v. *Kampfhenteel* (*a*). Foster should have
party to the application, as payment to McVitty would
discharge as against Foster, both of the co-creditors bei
sumed in equity to be entitled in severalty: *Encyclopa*
English Law, vol. i., p. 70; *Steeds* v. *Steeds* (*b*); *Bell* v. *R*
Accord and satisfaction is not a good plea when a claim i
The representative of Fitzpatrick should have been joinec
proceedings by an *ex parte* application under Order XV
or an order should have been sought under Order XVI
dispensing with a representative if there is none. The
fi. fa. should strictly pursue and be warranted by the ju
or order: *Chitty's Archbold's Practice* (14th ed.), p. 796.
setting aside *ex parte* orders, see *McNamara* v. *Cameron*

Mitchell for McVitty *contra*—The fact that the ord
obtained *ex parte* does not render it an order obtained
jurisdiction, and therefore it is good as to that ground.
is no authority for saying that a writ of *fi. fa.* cannot
favour of one of two parties. Foster has (as appears by Cr
affidavit) not been heard of for years, and it cannot b
that inability to find him should bar McVitty's rem
execution. He should be entitled to execution for h
amount at all events. The writ of *fi. fa.* was properly is
against Crowley only, without special leave of the Cou
first obtained. This was expressly decided in *Land*
Company of Ireland v. *Lord Fermoy* (*e*). Order XLII.
justifies our order. McVitty could be put upon term
giving security.

Davis in reply.

Cur. adv. v

HOOD, J. This action was brought by two plaintiffs
several defendants, and during the course of the action a
was obtained by two of the defendants, McVitty and
that the two plaintiffs should pay to them certain s

(*a*) [1895] 21 V.L.R. 202.
(*b*) [1889] 22 Q.B.D. 537.
(*c*) [1900] 26 V.L.R. 511, per Holroyd, J., at p. 526,
(*d*) [1890] 16 V.L.R. 108.
(*e*) [1870] L.R. 5 Ch. App.

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costs. Many years elapsed and the money was not McVitty applied *ex parte* to Holroyd, J., under Order 23, for leave to issue execution after a lapse of six hat order was obtained *ex parte*, and directed that e at liberty to issue a writ of *fieri facias* in the action plaintiff, Thomas Crowley.

intiff Crowley has now taken out this summons to order set aside, and by the consent of Holroyd, J., before me for decision, and I think that it should le. As a rule, the writ of *fieri facias* must accord judgment in all respects. If it does not accord, n for its not doing so must be shown. The decisions clear on this point, not only those cited by Mr. Davis, hose mentioned in the notes in *Chitty's Archbold's* 4th ed.), p. 796, and in *Daniell's Chancery Practice* pp. 659, 660. In this case there was a judgment or vo persons against other two persons, and the writ of , founded upon that is by one of those claimants of the persons liable. I think that is clearly wrong, he order should be set aside. The plaintiff under- ring no action, I set aside the order, with costs.

Order set aside.

rs for Crowley: *Pavey, Wilson & Cohen.*

rs for McVitty: *Phillips & Clarke* (for *Pearson & larat*).

H. I. C.

MOORE *v.* NELSON.

F.C.
1903
August 13, 14
September 2

Act 1890 (*No.* 1103), *ss.* 208, 209—*Contract for sale of land—Authority of agent—Parol evidence—Conditions of sale.*

rincipal gives authority in writing to an agent in general terms to nd at a fixed price he will not be bound by any contract of sale agent unless it be a reasonable and proper contract having regard of the property, the circumstances of the case, the practice of the he views of the principal where they are known to the agent.

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A. bought certain land from B., the agent of the vendor, and imme afterwards signed an authority to B. to sell part of the land at 7*l.* per ac on the same day signed a contract for the sale of this part to C. One conditions of this contract embodied Table A of the *Transfer of Land A* and fixed the time for completion at one month. All parties had not A. had only bought that day under similar conditions.

Held, that this was not under the circumstances a reasonable contra therefore not one which the agent was authorized to make.

APPEAL FROM COUNTY COURT.

This was an appeal from the County Court in its equ jurisdiction. The plaint was as follows:—"The plainti mands the specific performance by you of a contract of sale 31st January 1903 to him of certain freehold land, being, e in the alternative damages for breach of the said contract,

At the trial it appeared that on 31st January 190 defendant, Mary Nelson, had purchased a property incl among other pieces of land a piece of about 20 acres, the su of this action. This purchase was made under a contrac conditions of which were, with the exceptions below s practically the same as the conditions of the contract referred to. The property was bought from and through and McColough and Alf. E. Wallis and Co., as auctioneers agents for the vendor. Immediately after the purchas defendant signed and handed to A. McColough the follo authority:—

"31st Januar

"To Messrs. Howe and McColough and Alf. E. Wallis and Auctioneers, Bendigo.

"I hereby authorize you to accept the sum of 7*l.* per ac 20 acres, being, etc., with the right to remove the sale yards erected thereon, leaving boundary fences intact.

"(Signed) M. NELSON

A few minutes afterwards the agents sold the 20 acres t plaintiff, George Moore.

Amongst the conditions of sale, which were contained printed form, were the following:—

"(1.) The conditions in Table A of the *Transfer of Lan* 1890 shall apply to this contract save and except in s

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y are hereby modified or are inconsistent with the
ng conditions :—
.) Immediately after sale the purchaser shall . . . .
deposit of 25 per cent. of the purchase-money and shall
e balance within one month from date of sale.
.) Upon payment of the whole of the purchase money
ıdor will execute a proper transfer of the property to the
ser, such transfer to be prepared by and at the expense
purchaser."
following words of the printed form were allowed to
n the contract of sale to the defendant, but were crossed
the contract of sale by her agent to the plaintiff, viz. :—
the purchaser shall also pay the vendor's costs of and
tal to the production of the title and the perusing and
ing and copying, examining, and obtaining the execution
said transfer."
2.) This sale is made subject to cheque lodged on sale of
ing paid on presentation."
dition 12 was not contained in the contract of sale to the
ant.
material part of the contract was as follows :—
, the undersigned Howe & McColough and Alf. E. Wallis
(auctioneers in conjunction), as agents for and on behalf
vendor, Miss Mary Nelson, do hereby acknowledge that
e this day sold to William Wallace the property comprised
above particulars, subject to the foregoing conditions, for
ce of 7*l.* per acre. And I the said William Wallace do
ledge that I have purchased the said property sold to me
esaid for the sum above stated, and I agree to fulfil the
ng conditions of sale.

(Signed) HOWE & McCOLOUGH,
ALF. E. WALLIS & CO.,
Auctioneers and Agents for Vendors.
WILLIAM WALLACE, Purchaser,
As Agent for George Moore.

2nd February, in answer to an inquiry, the defendant
erbally informed by the agents that the land had been

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sold a few minutes after she left the office. She stated th had sold to her brother, and was informed that it was t She then gave the following notice in writing:—

2nd Febru

To Messrs. A. E. Wallis & Co. and to Messrs. H McColough, Auctioneers.

Take notice that I, the undersigned Mary Nelson, withdraw from sale the 20 acres of land, permission to sel land you obtained from me on 31st January . . . . hereby revoke such permission, and request you not to p further with any negotiations for a sale that you ma entered into on my behalf or otherwise.

(Signed) M. NELS

The defendant on being applied to to produce title an out the contract refused to do so, whereupon the p brought this action.

The County Court Judge gave judgment in favour plaintiff for 50*l.* damages, with costs. From this decisi defendant appealed.

Bryant for the appellant—(*a*) There is no evide damage. (*b*) The contract does not satisfy the *Stat Frauds.* The name of the purchaser is given as Walla Moore, the plaintiff's name. The name of the purchas not appear at all in the contract. (*c*) The contract a made is not the contract which the agent was author make: *Vide* sec. 209 of the *Instruments Act* 1890.

He referred to *Bain* v. *Fothergill* (*a*); *Engell* v. *Fit Chadburn* v. *Moore* (*c*); *Rosenbaum* v. *Bellson* (*d*); *K Grimwood* (*e*); *Hunter* v. *Daniell* (*f*); *Forbes* v. *But Prior* v. *Moore* (*h*); *Hamer* v. *Sharp* (*i*); *Donald Noble* (*k*).

(*a*) [1874] 7 H.L. 158.
(*b*) [1869] L.R. 4 Q.B. 659.
(*c*) [1893] 67 L.T. 257.
(*d*) [1900] 2 Ch. 267.
(*e*) [1891] 17 V.L.R. 253.
(*f*) [1845] 4 Hare 420.
(*g*) [1903] 25 A.L.T. 26.
(*h*) [1887] 3 *Times* L.R. 624
(*i*) [1874] L.R. 19 Eq. 108.
(*k*) [1888] 14 V.L.R. 1021.

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K.C. (with him *Levinson*)—As to the purchaser not not being named, it is sufficient if his agent signs or Parol evidence is admissible to show the real *Leake* (4th ed.), p. 188; *Higgins* v. *Senior* (*l*). authority of the 31st January, if there be any o its being an authority to sell, the notice to the 2nd February makes it quite clear. As to whether reasonable exercise of the authority, *vide Donaldson upra*) and *Rosenbaum's Case* (*supra*).

referred to *Commons* v. *Scott* (*m*); *King* v. *Grim- Engell* v. *Fitch* (*o*); *Godwin* v. *Francis* (*p*); *Day n* (*q*).

in reply—The conditions are not reasonable and unless express authority is given to insert them, thority will be implied. By "reasonable" is meant having regard to the circumstances of the particular

Cur. adv. vult.

., read the following judgment:—By sec. 209 of the *ts Act* no action shall be brought upon any contract of land if the agreement on which such action shall be signed by any other person than the party to be unless such person so signing be thereunto lawfully in writing signed by the party to be so charged." here a contract is signed by an agent, the person hat contract must prove that the agent was authorized o make the particular agreement sued upon. In the e, therefore, the plaintiff must establish that the hority given by the defendant justifies the contract tually signed, and I assume, for this purpose, that the ave the agents power to sell the land and to sign act. The question then is whether or not the question "is a reasonable and proper contract, having e nature of the property"—*Rosenbaum* v. *Bellson* (*r*)—

8 M. & W.
L.R. 20 Eq. 11.
L.R. 253.
Q.B. 659.

(*p*) [1875] L.R. 5 C.P. 295.
(*q*) [1899] 2 Ch. 320.
(*r*) [1900] 2 Ch., at p. 271.

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and "having regard not only to the circumstances particular case, but also to the practice of the market"—*son* v. *Noble* (*s*)—and one of the circumstances to be con "would be the views of the principal," if known agent (*t*).

Taking those tests as a guide, in my opinion the de is not bound by this contract. There is but little eviden the practice of the market. The only statement is that auctioneer, who said in re-examination, "I consid conditions of sale fair and reasonable." He was not examined on this point, and I leave it there for what it worth. But looking at the nature of the propert circumstances of the case, and the views of the prin known not only to the agents but also to the other si contract seems to me manifestly unfair. The defenda only purchased the land herself on the very day th contract was made, and the same agents acted i transactions. The contract, by clause 12, shows that t known to all parties. She had therefore only an e interest, and the agents knew by the first contract that t when she would get the legal estate was altogether un Yet in face of this, the contract embodies Table A *Transfer of Land Act*, and fixes the time for completion month. The effect is that the defendant would have to a certificate of title, and, on acceptance, give possession fourteen days, and sign a transfer on payment at the e month—matters which all concerned must have known sh not reasonably do. In addition, by the alteration of cond the defendant would have to pay a lot of costs which ot would fall on the purchaser, and which she also had under the first contract, so that her agents made her pa costs both when she was purchaser and when she was Moreover, according to the evidence of Wallis himself, co 12 was only put in to protect the agents, which is pecu say the least of it, and I cannot think such a contract which the agents were authorized to make.

I need not touch the other points raised, but it seem

(*s*) 14 V.L.R., at p. 1036. (*t*) *Ib.*, at p. 1037.

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there was no evidence of damage. The plaintiff had the market value of the land at the time when refused to complete, or at the time when she ought to leted. The only evidence is by the plaintiff, who said, e to the land, "It is worth 10*l.* an acre to me." He was pert. He had just bought the land for 7*l.* from d agents, whose duty it was to obtain the highest ce. To conclude, therefore, that 10*l.* was the market say either that the land had risen enormously in e course of a few days, or that these agents grossly their duty, and there is not a tittle of evidence to er assumption. It was urged that the Judge was at a jury, to infer that the plaintiff's words meant that ll the land for 10*l.* Even if such an inference could e drawn, the Judge did not come to that conclusion. On the question of damages the evidence is all one ntiff stated that the land was to him worth 10*l.* per was the price he authorized Mr. Wallace to give for shows that the 10*l.* was the value the plaintiff placed nd as a purchaser and not as a seller, and that it had l value to him in his business as a farmer.

ther Holroyd agrees with me, and the appeal will be th costs, and judgment entered for the defendant with

ETT, J. I agree generally with the views of my od as to the contract being in excess of the authority The agent knew that his principal could not safely he ordinary conditions of sale as to the production of of title and transfer, as she had herself only just terms which would not enable her to produce title or immediately.

ld not have performed her contract with the plaintiff taining concessions from the vendor to her. The from her was in a position in which he could have the contract unless she complied with conditions might have been unable to perform. The judgment ed notices the striking out of the condition throwing

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A'Beckett, J.

upon the purchaser the cost of the vendor's producing t
of approving, copying, and obtaining execution of the
which was allowed to stand as against the defendan
contract with her vendor.

This striking out may be significant, but I canno
observations on this subject pass without expressing my
that the condition struck out is most objectionable, an
which no purchaser under ordinary circumstance
reasonably be asked to assent. As affecting the costs
have also to observe that on the facts it appears to me
defendant's reason for refusing to carry out the cont
simply that she had changed her mind, and this led her
to assert that she had sold to her brother. She de
authority of her agent to enter into any contract on h
and took various other objections not sustained. The
which prevailed was her lawyer's, not her own. F
reasons I would have left her to bear her own costs belo

Appeal all

Solicitors for the appellant: *Cohen, Kirby & Woodu*
Solicitors for the respondent: *Quick, Hyett & Ryme*

HOOD, J.
1903
October 14, 21.

Smith v Savage (1905) 2 KB 88

ROCHE *v.* LAVIS.

Health Act 1890 (*No.* 1098), *ss.* 43, 61, 71—*Adulteration—Purchase for Purchase of three bottles of the same article—Admixture and subd three parts—"Any article"—Compliance with statutory provisions.*

The informant purchased in the defendant's factory three bottles of vinegar manufactured by the defendant, intimating his intention of vinegar analyzed. He opened the bottles, mixed their contents, and the mixture into three bottles, each of which was marked and seale was delivered to the vendor, one to an analyst, while the third was r the informant.

Held, that there was but one purchase of a quantity of one article o that sec. 61 (*a*) of the *Health Act* 1890 had been complied with.

Mason v. *Cowdary* ([1900] 2 Q.B. 419) and *Fecitt* v. *Walsh* ([1891] 2 discussed and distinguished.

ORDER TO REVIEW.

The defendant, John Lavis, was charged on the info of Police Inspector Roche that he "did sell, to the pre

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ser, the said informant, an article of food; to wit, inegar, which was not of the nature, substance, and uch article demanded."

ts and the grounds of the order *nisi* sufficiently the judgment of Hood, J. (*infra*).

for the informant to move the order absolute.

for the defendant to show cause, in addition to the ed to below, cited *Barnes* v. *Chipp* (*b*); *Parsons* v. *n Dairy Co.* (*c*); and *Ford* v. *Urquhart* (No. 2) (*d*).

referred to *Buckler* v. *Wilson* (*e*); *Bell & Scrivenor of Food and Drugs Act* (3rd ed.), 52; and the *Health* ecs. 65, 67, 68.

Cur. adv. vult.

, read the following judgment:—On the 8th of May formant called at the defendant's cordial factory and ree bottles of raspberry vinegar, which were sold to He then opened the bottles, and decanted them into er bottle. Having thus mixed the contents of the s, he re-divided them into three parts, with the inten- plying with sec. 61 of the *Health Act* 1890. Upon was ascertained that the vinegar was adulterated, pon the defendant was prosecuted for an offence 43 of that Act. At the close of the case an objec- ken that sec. 61 had not been complied with, as the hould have divided the contents of each bottle

Act 1890, sec. 61:— purchasing any article tion of submitting the s shall after the purchase eted forthwith notify to agent selling the article have the same analyzed and shall offer to divide three parts to be then ated and each part to be ealed or fastened up in its nature will permit and shall if required to do so proceed accordingly and shall deliver one of the parts to his seller or agent. He shall afterwards retain one of the said parts for further comparison and submit the third part if he deems it right to have the article analyzed to an analyst."

(*b*) [1878] 3 Ex. D. 176.
(*c*) [1882] 9 Q.B.D. 172.
(*d*) [1896] 21 V.L.R. 690.
(*e*) [1896] 1 Q.B. 83.

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separately. The magistrates agreed with this view, missed the case. An order *nisi* to review was then upon the following grounds:—

1. That the police magistrate was wrong in dec sec. 61 of the *Health Act* 1890 had not been complied

2. That compliance with sec. 61 was not a condition to a conviction for the offence charged.

As to the first point, the defendant relied upon th *Mason* v. *Cowdary* (*f*) and *Fecitt* v. *Walsh* (*g*). In t case it was held that where a purchase was made of of the same article of food, each bottle was for the the Act a separate article, and that it was not su divide them into three lots of two bottles each withou any of the bottles. There was no evidence whether bottles were identical in character or appearance, or w not the labels on all the six bottles bore the name of chemist. The defendant kept a small general shop, clearly not the manufacturer. In the present case, als no evidence as to the description of the bottles, but I clear that the vinegar was manufactured by the defe it was sold in his factory. This fact may make a between the cases, inasmuch as here it may be r inferred that the bottles all contained similar liquid the English case that did not appear. The judgment is not based upon this point, and as it stands it is p me. The English section, like our sec. 43, refers to th purchase of "an article of food." The article of food i would be that for which the purchaser inquired, character or quality could not be altered by referen number of bottles or other packages in which it was There was only the one purchase, and only the one food. The mention of the number of bottles is but a indicating the quantity required. If in such a case th the article of food were 10*l.* or upwards, could it be su contended that there were six sales, and not one, s the *Statute of Frauds?* See *Baldey* v. *Parker*

(*f*) [1900] 2 Q.B. 419. (*g*) [1891] 2 Q.B. 304.
(*h*) [1823] 2 B. & C. 37.

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ought, and the vendor sold, at one time, one quantity
le of food, and I cannot see how the fact that the
enclosed in six bottles made the sale one of six
ut however this may be, *Mason* v. *Cowdary* is on
ound clearly distinguishable from the present case.
ment it is said that the inspector "did not open any
tles, or mix or divide their contents." That is
n reference to the fact that there was nothing to
similarity in the bottles, because it implies that,
bottles might have come from different makers, yet,
ntents had been mixed, that would have been
In this case, the Inspector did combine the whole of
purchased in the way suggested, while *primâ facie*
e vinegar was of the same manufacture. It was
this plan of mixing might work injustice to the
inasmuch as it might be that only one bottle
ny injurious ingredient, and it might have been
under such circumstances as to excuse the defendant
71. Even if this were so, the defendant has only
blame. By delivering the three bottles in answer to
uest for raspberry vinegar, he, being the manufacturer,
clared that they all contained like substances, and if
lly any difficulty, he is the one to suffer. But I see
difficulty. If all three bottles fall within sec. 71 the
ppears. If only one or two are within that section,
nt could prove that his own manufacture was pure
were so), and that therefore any adulteration in the
proceed from the purchased ones, and so sec. 71
n protect him. I cannot therefore see that any
likely to arise from the course adopted in this
In *Fecitt* v. *Walsh* the defendant had contracted to
to a workhouse, and he was prosecuted under sec. 9
Vict., c. 63 (sec. 47 of the *Health Act* 1890) for
the cream from the milk. It appeared that a
had, by virtue of sec. 3 of 42 & 43 Vict., c. 30 (sec.
Health Act 1890), taken five samples of the milk from
t cans in the course of delivery, and it was held that
five offences, as the procuring of each sample was a

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separate transaction. The constable's demand for a sam of each can amounted under the section to a purchase, an demand and supply would constitute a complete contr itself. Moreover, the milk in the cans differed in qua appears by the finding of the justices; and according statement of counsel, it seems that cream had been abs from each can separately. So that the defendant had s distinct samples of milk under circumstances const distinct sales, and the result showed that he had been gu five distinct offences. It appears in addition from the ju that, in the opinion of that Court, the quantity supplie day constituted only one sale as between the defendant a workhouse authorities, even though the milk was deliv separate cans—an opinion which does not seem in accor *Mason* v. *Cowdary*. So that neither of these cases, opinion, supports the decision of the magistrates, which think, erroneous. There was here but one purchase quantity of one article of food, viz., raspberry vinegar, a course adopted by the Inspector was correct. I need say n about the other ground. The order *nisi* will be absolut costs. Case remitted for rehearing.

Order absolute; case remit

Solicitors for the informant: *Gillott, Bates & Moir.*
Solicitors for the defendant: *Phillips & Clarke.*

H. I

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Aff. post. p. 610.
A. (1905) AC. 371.

ERAL FINANCE AGENCY AND GUARANTEE ANY OF AUSTRALIA LIMITED *v.* THE ONAL TRUSTEES EXECUTORS AND AGENCY ANY OF AUSTRALIA LIMITED.

A'BECKETT, J.

1903
August 19, 20, 21, *October* 1.

0 (*No.* 1140), *ss.* 59 (2), 68—*Mortgage containing acknowledgment of money—Stamp duty—Admissibility in evidence for limited Trustee—Breach of trust—Trustee following solicitor's advice—of trustee's solicitor—Liability of trustee—Payment by trustee to entitled—Acquiescence by beneficiary in breach of trust—Right of to sue—Jurisdiction of Court to relieve trustee from personal Acted reasonably"—Trusts Act* 1901 (*No.* 1769), *s.* 3—*Practice—ssignment of trust fund by way of mortgage—Accounts of money r mortgage—Representative of assignor's estate.*

re of assignment by way of mortgage contained the following consideration of the sum of 650*l.* the receipt whereof he doth ledge the said mortgagor doth hereby assign, etc." The in- stamped. Below the signature of the mortgagor to the indenture receipt by him for the 650*l.*

t the receipt in the body of the indenture required a stamp.

at the document was admissible in evidence as a mortgage, and of showing that the mortgage was to secure a certain sum.

F. died intestate, having a vested interest in remainder in a trust alty, and leaving surviving her two children and her husband, ministered to her estate and became beneficially entitled to the In 1891 J. F. assigned to the plaintiff, by way of mortgage, the terest in his wife's estate to secure the sum of 650*l.* with interest per cent. In 1894 J. F. died intestate, and no representative of appointed. In 1897 the tenant for life of the trust fund died. In f administration of the estate of M. F., left unadministered by nted to the defendant company, which was also one of the trustees In 1899 the trustees of the fund, acting on the advice of their l two-thirds of the trust fund to the defendant company, as *de bonis non* of M. F., by which it was divided between the two F., and paid the remaining one-third into Court, alleging that the assignment and the amount owing thereunder were in dispute. believing at the time that it was entitled to one-third only of the protest against the payments referred to of the other two-thirds. r breach of trust against the trustees of the fund, or alternatively efendant company as administrators *de bonis non* of M. F., it was sum considerably greater than the whole of the trust fund was laintiff under the mortgage.

the trustees of the fund were not liable for the payment to the pany as administrator *de bonis non*, as the latter was the proper ive the money, but that the latter was guilty of a breach of trust t of the money to the children of M. F., and that the plaintiff was over in respect to such breach of trust.

swer *per se* to a complaint for a breach of trust that the trustee has

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followed legal advice; and a trustee, though he may have followed legal a if he has acted in an unreasonable manner with regard to the beneficiary a —as, for example, in giving away his property to other people—cannot be have "acted reasonably" within the meaning of sec. 3 of the *Trusts Act* 18

Held, that though the amount owing was in dispute, a representative estate of the assignor mortgagor was not a necessary party to the action.

In re Bell ([1896] 1 Ch. 1) and *Hockey* v. *Western* ([1898] 1 Ch distinguished.

ACTION.

Roderick McDonell died on the 31st July 1858, leav will whereby he bequeathed to trustees therein named a personal estate upon trust for the benefit of his daughter, Howe, during her life, and after her death for the benefit children in equal shares, and so that, in the case of a dau her interest should become absolutely vested at the age or on marriage On the 22nd July 1872 Mary Grace Ho daughter of Anne Howe, married John Fraser, and on th July 1876 died intestate leaving her surviving her husban two children, and being entitled to a one-sixth sha the trust funds, subject to the life-interest of Anne and on the 24th August 1876 letters of administ of her estate were granted to her husband, John F By indenture dated 6th February 1891 John Fraser, in sideration of the sum of 650*l.* lent to him by the plaintiff, thereby for himself his executors administrators and a administrator of the estate and effects of the said Mary Fraser assign unto the plaintiff all and singular the pa share interests claims and demands whether vested or conti in possession or reversion original or accruing or otherw him the said John Fraser into out of and upon the said funds and other the personal estate of the said Ro McDonell and the estate and effects of the said Mary Fraser whether as the husband of the said Mary Grace or as the administrator of her estate and effects or othe And all interest to become due in respect thereof. To have and take the same absolutely subject to a proviso for redem upon repayment of the said sum of 650*l.* immediately o said share under the said will becoming payable but if the should not previously become payable then on the 6th o

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894 together with interest in the meantime and until nt of the said sum at the rate of 20*l.* per cent. per be computed from the date of the said indenture by rterly payments on the 6th day of the months of October and January in each year." The indenture ned a provision whereby John Fraser "did irrevocably constitute and appoint" the plaintiff his attorney "for name of the mortgagor or otherwise to ask demand over receive and take possession of the said share and roperty moneys and securities thereby assigned from or bodies liable to convey transfer pay or deliver the ctively and on receipt thereof in the name of the said er or otherwise to give sufficient receipts and dis- the same." On the 28th February 1891 this assign- duly registered, and on the 10th April 1891 notice of nent was served personally on the then trustee of the

19th June 1894 John Fraser died intestate, leaving ing his second wife and the two children by his first e-mentioned. On the 8th July 1895, in accordance rovisions of the said will, the defendants, the National xecutors and Agency Company of Australia Limited r Madden, were appointed trustees of the will in the e then trustee, and the sum of 6549*l.* was paid to held upon the trusts of the will.

18th December 1897 Anne Howe died. On the 28th 8 letters of administration of the estate of Mary Grace unadministered by John Fraser were granted to the company.

99 the defendants paid into Court the sum of 4*d.* (less 12*l.* 1*s.* 6*d.* for costs), being one-third of the 926*l.* 15*s.* 1*d.* in their hands in respect of the share race Fraser in the trust funds; while they paid the two-thirds, amounting to 673*l.* 18*s.* 10*d.*, to the company as administrator *de bonis non* of Mary er.

aintiff, by its statement of claim, contended that this ment was a breach of trust, and claimed against the

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defendants as trustees of the will, and also personally (para 27), or alternatively against the defendant company as ad trator *de bonis non* of Mary Grace Fraser, payment of th sum of 673*l.* 18*s.* 10*d.* and interest. In their defence the defe said that the plaintiff had claimed one-third only of the sai of 926*l.* 15*s.* 1*d.*; that the plaintiff's claim and the valid the said assignment were disputed by the persons benef interested in the estates of Mary Grace Fraser and John F that no representative of John Fraser's estate had appointed; and that under the advice of their solicitors and the knowledge and acquiescence of the plaintiff and all parties concerned, the said sum of 308*l.* 18*s.* 4*d.*, as repres the third share claimed by the plaintiff, and in dispute, wa into Court, and the remaining two-thirds of the said sum paid to the defendant company as administrator *de boni* of Mary Grace Fraser, and was by it distributed to Edgar Fraser and Ruby Margaret Docker, the children of John Mary Grace Fraser.

At the date of the issue of the writ the money owing the security of the indenture of 6th February 1899 was 65 principal and 1571*l.* 15*s.* 10*d.* for interest.

In the body of the indenture of 6th February 1899 we words:—"Now this indenture witnesseth that in pursua the said agreement and in consideration of the sum hundred and fifty pounds this day lent advanced and paid said mortgagee to the said mortgagor as aforesaid the whereof he doth hereby acknowledge he the said mortgago hereby assign etc. etc."

At the end of the indenture, and underneath the sig of the mortgagor thereto, were the words:—

"Received on the day and year first above written from the General Finance Agency and Guarantee Compa Australia Limited the sum of six hundred and fifty poun consideration money above mentioned to be paid by it to n

VICTORIAN STAMP 1d. CANCELLED. J. F. 6/2/91.

"JOHN FRASE

"Witness—AYRAULT BURNS."

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lenture was executed and the receipt was given and was cancelled in New South Wales.

r facts appear from the judgment.

K.C. (with him *Guest*), for the plaintiff tendered the in evidence.

l for the defendants—This instrument is inadmissible e, not being stamped as required by the *Stamps Acts*. a acknowledgment in the body of the instrument of ing been received, which is a "receipt" within the f the *Stamps Act* 1890, and as such must be stamped. attached to the receipt at the end of the instrument ubsidiary and independent instrument altogether, not The *Stamps Act* 1890, sec. 59 (2), expressly provides ore than one instrument be written upon the same naterial every one of such instruments is to be and distinctly stamped with the duty with which it ble." See also sec. 60. It is immaterial that the was executed in New South Wales; under the Act it e been stamped within two months of its coming into See sec. 66 (2). Amongst the exemptions from stamp dditional receipt indorsed upon any instrument duly In other words, if the deed itself be duly stamped, liary receipt need not be. But the Act does not r the converse case. *Macmanamny* v. *Goodwin* (*a*) a duplicate receipt must be stamped.

erred to the *Stamps Act* 1890, secs. 32, 34, 68, and the edule, Part II.

—In the case of *Davies* v. *Herbert* (*b*) a mortgage was distinct from the covenant to pay which it contained: iginbotham, J., at pp. 395, 396. So here the assign- listinct from the so-called acknowledgment of the money, and we are tendering in evidence only the itself, which is perfectly good without the few lines said to constitute a receipt. There may be several

] 27 V.L.R. 566. (*b*) [1885] 11 V.L.R. 386.

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instruments in a document, some of which are taxable an
not, and the fact that the taxable part is not stamped
reason why the non-taxable part should not be recei
evidence. There is nothing to that effect in the Act itself

[A'BECKETT, J. Your argument is that the Court sh
most reject that part of the document which acknowledg
receipt of money, and admit the rest?]

Yes.

(He was stopped.)

Weigall in reply—In *Davies* v. *Herbert* (c) the questi
whether a mortgage was a promissory note within the mean
sec. 51 of the Act No. 645 (now sec. 81 of the *Stamps Act*
and the Court merely held that a sensible meaning m
given to the section. The indenture consists of only one i
ment, containing a number of things, one of which is a du
matter, and not of a number of instruments.

A'BECKETT, J. I think that, in accordance with the
acted upon in the case of *Davies* v. *Herbert* (d) (partic
those of Higinbotham and Molesworth, J.J.), and in the
of *Castlemaine Brewery Company Limited* v. *Collect*
Imposts (e), I ought not to hold this to be a good objecti
think that, in dealing with questions as to the admissibili
evidence of an unstamped document, you should look a
document itself to see what it essentially is, and what it is
put in evidence for. This particular document is a mort
other documents may be of another character. Mortgag
not subject to stamp duty; a conveyance would be subj
stamp duty. A mortgage is not in itself subject to stamp
and merely because you find in it what is a common featu
every mortgage—namely, an acknowledgment that mo
paid (which may be said to fall within the definition
"receipt," and may be therefore subject to special taxation)
should not, in my opinion, say "Now this is a receipt, a
this mortgage contains a receipt, it is inadmissible in evi

(c) 11 V.L.R. 386. (d) 11 V.L.R. 386.
(e) [1896] 22 V.L.R. 4.

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is unstamped." It is difficult, no doubt, to carry out f the separation of the different parts of a document, ot think that a document should be invalidated where used for some purpose which is its primary purpose, you should exclude it merely because something is y mentioned in the same document which, if it stood ld require a stamp. As I have already observed in of the argument, if the whole of this mortgage be le, then a conveyance would be inadmissible unless receipt stamp in addition to the stamp for the f the *ad valorem* duty charged. I do not know ision in the Act which would exempt such a from duty. I am not speaking of the receipt indorsed at the foot of a conveyance, but of the gment in the body thereof, which is as common f all conveyances as the receipt in the body of this s of all mortgages. In fact, you find this receipt in tgage. Of course, it is not necessary for me to decide but if I were to hold this document inadmissible, the ning would apply in the case of an acknowledgment ly of a conveyance. I overrule the objection, and ocument to be admissible as a mortgage, and for the f a mortgage, and for the purpose of showing that this s to secure a certain sum.

Objection overruled. Document admitted for limited purpose.

llowing arguments are additional to those which n the judgment :—

l—The defendants were strictly within their rights in administrator *de bonis non* of Mary Grace Fraser, nistrator being the proper person to give a receipt ney, and the plaintiff's remedy (if any) is against such tor and against E. J. Fraser and R. M. Docker. The of claim makes no charge sufficient to support the claim against such administrator. Not only should

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E. J. Fraser and R. M. Docker, who have received the mo and are the parties most concerned, be joined as parties, an heard as to their rights, but the estate of the assignor sh also be represented, not only because the validity of the ass ment is in issue, but because it is alleged that the assignor by no means so much indebted to the plaintiff company a books show. *Cf. Hockey* v. *Western* (*f*), where the position much the same as here. There the trustees, not being furni with an account, and having reason to believe it questio how much money was due to the mortgagee, offered to pay so much of the money as upon taking an account shoul found due to him, but declined to pay him without such acc and the Court of Appeal, affirming the decision of the C below, held that they could not be said to have acted unrea ably, and that the decision in *In re Bell* (*g*), of which approved, was applicable. This is a case in which sec. 3 of *Trusts Act* 1901 (the effect of which is that a trustee wh the opinion of the Court, has acted honestly and reason should not be held personally liable) should apply. The rem of the plaintiff lies in getting back the money from those improperly obtained it, not in making the trustees perso liable. The defendants have acted honestly and with e care, and after taking legal advice. Probably the advice g by the defendants' solicitors as to the proper distribution of Fraser's share was wrong, but it was always a moot point, to the passing of sec. 25 of the *Married Women's Property* 1884, as to whether the whole of the personalty of a ma woman went on her death to her husband: See *Duffy & Ir on The Law of Married Women's Property*, pp. 227, In *Perrins* v. *Bellamy* (*h*), trustees of a settlement, erroneo assuming that they had a power of sale, had sold ce property, to the rents and profits of which the plaintiff entitled for life, and were sued by the plaintiff for diminution of his income caused thereby, but the Cou Appeal held, affirming the decision of the Court below, tha on the evidence the trustees had acted honestly and reasona

(*f*) [1898] 1 Ch. 350.

(*g*) [1896] 1 Ch. 1.

(*h*) [1899] 1 Ch. 797.

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ntitled to be relieved from personal liability, and the accordingly dismissed. *Cf.* also *In re Grindey* (*i*); *rt* (*k*); *In re Smith* (*l*); *In re Lord De Clifford's* ; and *Underhill on Trusts* (5th ed.), pp. 280, 359; negligence of solicitors generally, see *Beven on* pp. 790, 795.

The burden of proof is on the trustees to show that acted in such a manner as to relieve them from The Legislature has given the Court a dispensing r sec. 3, sub-sec. 1, in cases where a breach of trust stablished; that is to say, the Court, having found ach of trust has been committed, can relieve the n personal liability if 'he has acted honestly and and ought fairly to be excused for the breach of e *In re Lord De Clifford's Estate* (*n*). While the dispense mercy, it *must* do justice. How can it be e defendants ought fairly to be excused, when they e money back from the solicitors, whose negligent responsible for the mistake, while the plaintiff cannot, o privity between him and such solicitors? In all ed in which the trustees were excused, they would make the money good out of their own pockets.

—In *Perrins* v. *Bellamy* (*o*) the solicitors could have liable by the trustees, and yet the latter were m liability to plaintiff.]

te v. *Parkinson* (*p*) the trustee acted under the e solicitors to the trust, and though the Court found acted honestly and not unreasonably, still he was l from liability. "Reasonably" in sec. 3 means s a trustee. Trustees have to seek out at their peril persons and pay them. *Cf. Lewin on Trusts* (10th *et seq.* There is no case during the 6½ years that been in operation in England in which a trustee aid away money to the wrong person has been

2 Ch. 593.
2 Ch. 583, at p. 591.
71 L.J. (Ch.) 411.
2 Ch. 707.

(*n*) [1900] 1 Ch. 707, per Farwell, J., at p. 712.
(*o*) [1899] 1 Ch. 797.
(*p*) [1901] 85 L.T. 456.

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excused. The case of *In re Grindey* (q) was one of th
struction of a will, and the Court held that, having reg
the terms of the will, the trustees might reasonably
acted as they did. The facts of *In re Bell* (r) bear a
resemblance to those here, but that case is distinguis
because here it is perfectly clear that the plaintiff mortga
entitled to an amount considerably greater than the amo
the trustees' hands.

Counsel also referred to *Spooner* v. *Sandilands* (s
Williams on Executors (9th ed.), pp. 755, 802.

Cur. adv.

A'BECKETT, J., read the following judgment:—This
action to obtain redress for a breach of trust in paying
trust money to persons not entitled. The plaintiff is enti
assignee of a husband's interest in his deceased wife's
The wife died in 1876 intestate, and the husband admini
to her estate, and became beneficially entitled to the whole
A change in the law was made in 1884, by which, if a
dying after that date, left children (as this wife did), they
take two-thirds, and the surviving husband one-third.
the fund here became distributable, the defendants sough
solicitors' advice, and were told that the husband was enti
one-third and the children to two-thirds. Acting upo
erroneous information, the defendants paid away two-th
the fund to the children. The plaintiff sues to recover thi
thirds. The solicitors who made the mistake were o
standing, and it has not been suggested that the defe
should not have trusted them, or failed to give the
necessary information. The unfortunate slip in overlooki
date of the wife's death as affecting the plaintiff's rights w
confined to the defendants' solicitors: the plaintiff's sol
seem also to have overlooked it, for when they first inte
on its behalf they were merely concerned as to the on
which was to be paid into Court. It did not strike the
their client was entitled to the whole, and I have no dou

(q) [1898] 2 Ch. 593.
(r) [1896] 1 Ch. 1.
(s) [1842] 1 Y. & C.C.C. 390.

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third had been paid over three years ago they and would have been quite satisfied, and the payment to en would probably never have been questioned. about the end of last year the true position was , and this action was brought.

ain defence rests upon sec. 3 of Act No. 1769, the English law, which provides that—"If it the Court that a trustee is or may be personally any breach of trust but has acted honestly and and ought fairly to be excused for the breach and for omitting to obtain the direction of the the matter in which he committed such breach, ourt may relieve the trustee either wholly or partly onal liability for the same." Undoubtedly the acted reasonably from their own point of view, and n following the advice of their solicitor upon this tter, and I have therefore to decide whether they ly to be excused. The breach of trust was of the so far as the beneficiary was concerned, by giving roperty to other people. I doubted whether the new properly be applied to a case of this kind, so that the eneficiary should be told that he could have no redress trustees, because they had acted upon legal advice. he trustees answerable is a hardship for them, but to m may entail greater hardships for the beneficiaries. ed whether the expression "acted reasonably" was pplicable where the action of the trustees was most ble with regard to the beneficiary affected, but to be reasonable to them, because they relied on egal advice. The cases on the Act to which I have red would not warrant me in thus limiting the f the word "reasonably." I have gone back to the which established the rule that it was no answer to t of breach of trust to say that the trustee had he advice of counsel. *Doyle* v. *Blake* (*t*) is referred to *n Trusts* (10th ed.), p. 391, as the leading authority. d Redesdale says of an executor—"If, under the best

(*t*) [1804] 2 Sch. & Lef. 305.

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advice he could procure, he acts wrongly, it is his misfortune, public policy requires that he should be the person to suf If the long-established rule rests on public policy, that polic not to be disregarded by the Court in exercising its powers.

Cases decided under the Act seem to me to support the that a trustee acting under legal advice is not to be reli solely on that ground. In *Perrins* v. *Bellamy* (*u*) trustee was relieved who had made a mistake of administra in selling when he should not have sold. He had acted on advice, but in the judgment on appeal, and in the Court be the fact that he had so acted is noticed rather as an incide his conduct than as his complete justification. The nature o difficulty in which he was placed, and the reasonableness of act done in itself, independently of the advice which led t are enlarged upon. In *Waite* v. *Parkinson* (*v*) it was held the trustee had acted honestly, and not unreasonably; the f such as it was, was the fault of the solicitors; but the tru was held liable for making an excessive advance on insuffi security. Even if I thought that the Court possessed the po and should exercise it where the trustees must necessarily s the whole loss unless excused, I should be unwilling to excus a case in which they might be fully indemnified by the soli whose advice was acted upon. I am not deciding that there right to indemnity in this case. The persons who may be li are not before me, but I have every reason to believe tha they are liable, they are able and willing to indemnify. For reasons which I have stated, I shall not exempt the defen from liability for the breach of trust complained of.

Another defence is founded upon facts in connection wi peculiarity which I have before referred to, that at first plaintiff was as ignorant of its rights as the defendants Paragraph 5 of the defence, stated shortly, sets out that E Fraser and R. M. Docker, two children of Fraser, the mortg assignor, disputed the validity of the assignment, and all that the assignee mortgagee (the present plaintiff) had accounted, in consequence of which a difficulty arose as to p

(*u*) [1899] 1 Ch. 797. (*v*) 85 L.T. 456.

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e one-third treated as the plaintiff's share, in conse- which that third was paid into Court, and the balance uted between the children. It truly alleges that no omplaint was thereafter made by or on behalf of the d paragraph 7 submits that, by reason of such facts f cannot enforce any liability against the defendants. tiff, on its own motion, had asked for only one-third, ttled with the defendants on that basis, it might have self from enforcing the claim in this action, but the sion to observe the mistake of law into which the had fallen, and to correct it, by immediately more than was offered, is not strong enough for this The plaintiff did not deceive the defendants, or by its own induce the payments now objected to. It test, but this omission should not deprive it of its

approach a defence of a different character, raised by 8—"That the validity of the plaintiff's title as and the amount owing upon the security, cannot be in this action, or in any action in which the estate of er is not represented." Substance is given to this o far as the amount owing is concerned, by two horities, without which I should not have thought it f serious consideration. As to the issue of validity, I s no substance. The assignment under which the ims is dated February 1891, and is to secure 650*l.* ced, with interest at 20*l.* per cent. The assignment s absolute; it irrevocably appoints the assignee sue and get in the fund, and contains clauses giving demnity to the persons paying over the fund to the ven though nothing should, in fact, be due to e. It might be considered that, under an assign- is kind, it would not be competent for the person assigned fund to decline to pay until the amount security had been settled, so as to bind the asssignor presenting him. In *In re Bell* (*w*) trustees of a ed by an assignment as full as the present declined

(*w*) [1896] 1 Ch. 1.

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A'BECKETT, J.

1903

THE GENERAL FINANCE AGENCY AND GUARANTEE COMPANY OF AUSTRALIA LIMITED v. THE NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALIA LIMITED.

to pay over the whole share, but were ready to pay what was shown to be due to the mortgagee. On originating summons, Kekewich, J., held them to have been wrong. On appeal they were held to have been right. They had received notice of subsequent encumbrances, and Rigby, L.J., says—"I think that the trustees had a right to have the different claimants before them, and that it was their duty to settle the claims." In *Hockey* v. *Western* (x), Kekewich, J., had to deal again with a similar point. Trustees of a Land Society declined to pay the mortgagee of a share who was empowered to give them an effectual discharge. He had refused to furnish them with an account. They had reason to believe it questionable how much was due on the mortgage, and they refused to pay over the share, but offered to pay so much as, upon taking an account, should be found due to him. Kekewich, J., said—"I think they are right in law, according to the decision of *In re Bell.* They are entitled to say—'We will pay what is found due to you on an account taken in the presence of the legal personal representative, or assented to by him, and then the rest must be paid to that legal personal representative.' Unfortunately, there is no legal personal representative, and as far as I can see, there is no probability of there being one, but that does not seem to me to alter the position in the slightest, if my view of *In re Bell* is right." He dismissed the action on the defendants undertaking to pay the money claimed into Court. The Appellate Court dismissed the appeal. Importance seems to have been attached to the special circumstances of the case. Rigby, L.J., says—"I do not wish to throw any doubt on the efficacy of the receipt clause, or any other receipt clause in similar terms. It is one thing to say that trustees may take that receipt, and another thing to say that they must take it." Lindley, M.R., says—"If their (the trustees') suspicions are aroused, is it misconduct on their part to say—'We are not satisfied that we ought to pay you over the money; there are circumstances which render it unreasonable to ask us to pay the money over to a mortgagee?'" No doubt was expressed as to the *bonâ fides* of the defendants in either of these cases; the money was available, not gone from

(x) [1898] 1 Ch. 350.

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s as in this case. I think it would be most to extend the principle of these two cases to a case e trustee denies the plaintiff's right to any of the oes not appear that the whole fund will be sufficient e mortgage debt. I may venture even to express a whether the law, in its limited application, is not more harm than good, by causing unnecessary cost These inconveniences may often arise if trustees hemselves to protect rights which the assignor has in favour of everyone but his mortgagee, by hat, the fund being handed over, he, and those claim-im, shall have rights against the mortgagee only, and those who pay him. Where no fraud is suggested, the trustees have power to deprive the mortgagee of nder his contract? However, it has been decided ave the power, and I come to the facts of the present w how they are distinguishable from those in *Bell's s* cases.

he trustees have parted with the fund, and do not plaintiff's right to anything. John Fraser, the lied in 1894. His children, or some of them, were e assignment, that there was money payable under any surplus, after satisfying the assignee, would em. None of them took any step towards obtaining on. Some of them made loose assertions that due on the security, but these were unsupported by The plaintiff has, by its secretary, given evidence e of any payment by or on behalf of John Fraser d in its books. If nothing has been paid off, the will largely exceed the amount which the defendants o pay. In *Bell's Case* the debt was 400*l.*, and the 1000*l.* Taking all these facts into consideration, I efendants may, properly and consistently with the s, be ordered to pay, although there is no representa- Fraser with whom a binding settlement of account come to. If I thought the contrary there would be It is not reasonable to suppose that anyone would ter. In *Hockey* v. *Western* little more than a year

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had elapsed since the death of the intestate and the heari the action. Here it is over nine years since the death, and than four years since the fund was distributable, and the of kin of the assignor, through their solicitor, were ac inquiring about it.

Another defence is that the only breach of trust charg to the two-thirds is that it was paid to the administrat *bonis non* of Mrs. Fraser. The defendant company obt this administration to be granted to itself. The defen counsel rightly contended that payment to the adminis *de bonis non* was no breach of trust, as that administrato the proper person to receive. The assignment by John I was not equivalent to a reduction into possession of his interest in the fund. Administration *de bonis non* perhaps have been dispensed with, but it was the strictly re course. The plaintiff was entitled to be paid through channel. The real cause for complaint is not that the two- was paid to the administrator, but that the administrator the two-thirds to the children instead of to the plaintiff. charge is not made in so many words, but it is to be gat from the statement of claim. The plaintiff complains th defendants have refused to pay it. The statement of clai expressly claims, personally or alternatively against the dant company as administrator *de bonis non* payment o sum of 673*l.* 18*s.* 10*d.* To this relief I think the pl entitled, though the charge of breach of trust in paragraph unfounded. I therefore give judgment for the plaintiff, costs against the defendant company, for 673*l.* 18*s.* 10*d* interest at 4 per cent. from the date of the writ to the pr time.

Judgment for plaintiff agains defendant company, with cost

Solicitors for the plaintiff: *Pavey, Wilson & Cohen.*
Solicitors for the defendants: *Smith & Emmerton.*

H. I.

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[IN CHAMBERS.]

HOOD, J.

1903
October 8, 12.

RADSHAW'S GUIDE, *Exparte* STILLWELL.

raph Act 1901 (*Commonwealth, No.* 12), *ss.* 28 *and* 29—" *News-paper*"—*Bradshaw's Guide.*

as to whether a publication is a newspaper within the meaning *Post and Telegraph Act* 1901 is almost entirely one of fact, to be inspection of the document, guided by common knowledge.
n which in its real nature is essentially a book of reference is not hin the meaning of sec. 28.

an appeal by Alfred Stillwell, carrying on business nd Co., against the removal by the Deputy Post-al at Melbourne from the register of newspapers of ion called *Bradshaw's Guide to Victoria.* An vas also made for the restoration to the register of blication. The matter came on for hearing before ing in Chambers.

avits of the appellant stated that for twenty-six *haw's Guide* had been published monthly in that from 1879 up to the date of the *Post-Office* No. 1537) the publication was recognized and newspaper within the meaning of the various ament in force in Victoria relating to newspapers, ing that period recognized and treated by the ostal authorities as a newspaper. Upon the e Act No. 1537 the publication was registered in a newspaper, and was recognized and treated by n postal authorities as a newspaper. Upon the operation of the Act of Parliament No. 12 of 1901 lth Act) the publication was registered as a ithin the meaning of that Act, and from that time February 1903 the publication continued to be so d was transmitted through the post as a newspaper. her stated that, except as to the practical infor-ined in the publication, its character had never en followed a statement of the news and practical which the publication contained in each issue. This

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included a map of Victoria showing the lines of railway the names of stations, names of all cities, towns, etc., and qualifications; the population and areas of the Australian S a complete time table of all railways in Victoria, with dist fares, and other information relating thereto; list of charg luggage and goods, etc.; information as to tramways and information as to flower, fruit, and kitchen gardening f current month; names of Commonwealth Ministry and me of Parliament; names of the Governors of the States; and addresses of the members of the State Parliament; in tion as to qualification of electors and as to electoral roll of State departments, with names of the principal official of fees for making searches in the various departments; mation relating to the Melbourne and Metropolitan Bo Works, with lists of charges for sewering, draining, etc.; mation as to the various municipalities; information as to towns, rates, and matters relating to the closing of mail information as to telegrams and telephones; calendar for c month, showing historical events; table of probate c information as to consuls; table of time of "high wat Williamstown on each day. The publication was remove the register in February 1903.

Mitchell for the appellant in support of the application publication is a "newspaper" within the meaning of sec Act No. 12 (Commonwealth) (*a*). It has been recognize newspaper for twenty years in the State of Victoria, ar been recognized by the postal authorities of the Common for the past two years. Therefore it has been "know recognized" as a newspaper. It contains "practical in tion;" sub-sec. (*a*) of sec. 28 gives a definition of w "news," and the fact that it contains something which

(*a*) Sec. 28 (1):—"For the purposes of this Act a newspaper shall mean any publication known and recognized as a newspaper in the generally accepted sense of the word and printed and published within the Commonwealth for sale if—(*a*) it consists in sub part of news and articles rela current topics or of religious t or practical information and (published in numbers at interva more than one month. . . ."

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ll not destroy its character if it also does contain that
news."

for the respondent—The fact that the publication
recognized by the Victorian postal authorities has
do with this matter; it cannot amount to an estoppel;
tion of fact whether now it should be "known and
as a newspaper in the generally accepted sense of the
the evidence shows that it is simply a "guide," and
ation given is more or less of a permanent nature.
a year-book. There is no "news" given in the
nse of the word.

in reply.

Cur. adv. vult.

J., read the following judgment:—Under the pro-
the Acts relating to post-offices a publication called
Guide to Victoria had for many years been regis-
newspaper for transmission by post. Upon the
o operation of the Commonwealth Act (No. 12) of
tration was again effected, but last year an objection
and ultimately the publication was removed from the
The proprietor of the publication now applies, under
the abovenamed Act, to have it restored. The sole
whether or not this *Guide* is a "publication known
ized as a newspaper in the generally accepted sense of
within sec. 28 of the Commonwealth Act. This seems
rely a question of fact, to be decided upon an inspec-
document, guided by common knowledge. There is
in the section to define the persons by whom, the
e, or the manner in which the publication is to be
nd recognized," so that, if the words had stopped
ould have felt that there was much force in the
hat this publication has been "known and recognized"
vious registrations. But to my mind the additional
t entirely disposes of this view. It may be difficult
what publications would come within this section,
having reference to the complication pointed out by

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counsel, arising out of sub-sec. (*a*), and doubtless publications are extremely near the dividing line. But no hesitation in saying that this *Bradshaw's Guide* is publication "known and recognized as a newspaper in generally accepted sense of the word." In its real nature essentially a book of reference, and lacks every element of I should call a newspaper. Its form, its contents, and its u point to something totally different to an ordinary newsp whose main object is to give information about recent e and which is not a record, but is in its nature ephemeral, though many persons do file their copies for reference dismiss the summons.

Summons dismisse

Solicitors for applicant: *Fink, Best & Hall.*

Solicitor for Deputy Postmaster-General: *Guinness,* C Solicitor.

W. H.

HODGES, J.

1903 *November* 25.

GIBSON *v.* LEE SUEY.

Gold Buyers Act 1901 (*No.* 1780), *ss.* 3, 8—*Buying unwrought gold wit licence—Information—Sufficiency of—Person from whom gold bought—S out information—Order to review.*

In an information under sec. 3 of the *Gold Buyers Act* 1901 for buyin without a licence, it is not necessary to state from whom the accused is to have bought.

A. was charged simply with buying unwrought gold without being lice to do. The magistrates, before any evidence was taken, required the pros to state from whom accused was alleged to have bought, on the ground the absence of such information he would be prejudiced in his defence prosecution refused to give the information required, and the magi thereupon struck out the case.

Held, that they were wrong in so doing.

ORDER TO REVIEW.

The defendant, Lee Suey, was charged before the Cou Petty Sessions at Castlemaine under sec. 3 of the *Gold B Act* 1901 for that he did "on the 29th August 190 Castlemaine, unlawfully buy unwrought gold without licensed so to do." From the affidavits it appeared that, o

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called on, defendant's solicitor announced that he
or him, and that he pleaded not guilty, pointed out
information did not state from whom it was alleged
dant had bought the gold on the date alleged in the
n, and stated that unless he was informed from whom
l was so alleged to have bought, the latter would be
in his defence.
osecuting inspector refused to give the information

agistrates then stated that in their opinion the accused
ed to the information asked for, and suggested that
cution should supply it, and that the information
amended accordingly. The prosecution refused to
course, and thereupon the magistrates said they
urn the case to give the informant an opportunity of
the information asked for. The prosecuting inspector
he Bench that it was useless doing so, as the informa-
not be given. The magistrates thereupon struck the

rder *nisi* was then obtained to review this decision on
d that the justices were wrong in striking out the

return of the order *nisi*,

appeared to move the order absolute.

to show cause—The information was defective—even
nnically so, the accused was entitled to know exactly
he was charged. In such a case the magistrates have
nsist that the charge should be made specific. If the
n refuses to do so, and the justices thereupon decline
, this Court will not compel them to hear the case:
re, *Ex parte Newport* (*a*).
n referred to *Justices Act* 1890, sec. 203.)
ection does not dispense with the necessity of giving
of the charge, even though the language of the section
ch the charge is laid is followed: *Smith* v. *Moody* (*b*).

(*a*) 13 V.L.R. 310. (*b*) [1903] 1 K.B. 56.

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Half-a-dozen charges may be included in the information laid, and the defendant could not be in a position to objec evidence or cross-examine until he knew on which charge was being tried.

He also referred to *Reg* v. *Mollison* (*c*); *Stait* v. *Colenso* *O'Donnell* v. *Hitchen* (*e*); *Hitchen* v. *Phipps* (*f*).

Some of the *dicta* in the latter case seem to conflict *Reg* v. *Hare* (*supra*), but in *Hitchen* v. *Phipps* the questio amendment was not raised at the hearing, and the decisio really on the question of jurisdiction.

Cussen in reply—The information is perfectly correct form. *Smith* v. *Moody* merely decides that there are cer cases in which particulars must be given. Here the offenc constituted, from whomsoever the gold is bought, and it is necessary to specify the person from whom it is bought. If justices thought that an injustice was being done during case, they might have rejected the evidence. Even if justices were right in requiring the information required t given, they had no jurisdiction to strike it out on refusal.

HODGES, J. In this case there was an information be magistrates charging the defendant with buying gold unwrou without having a licence. When the information came on hearing, the magistrates, at the suggestion of the defend asked and required those representing the informant to give name of the person from whom gold was bought. The formant and his representative declined, and thereupon magistrates struck the case out. The question is whether t were right in so doing. The charge is under sec. 3 of the No. 1780. The section itself says no person shall, after March 1902, "buy any unwrought gold or gold amalgam un he is the holder of a licence." The section says "No per shall buy." It does not say no person shall buy from any ot person or other class of persons. It generally and absolut prohibits the buying of unwrought gold. In my opinion

(*c*) [1876] 2 V.L.R. (L.) 51.
(*d*) [1902] 28 V.L.R. 286.
(*e*) [1902] 27 V.L.R. 711.
(*f*) *Post*, p. 422.

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n would be sufficient, and is sufficient, to make a
hin that section when it charges, following the words
tion, that the person did buy unwrought gold, he not
rson licensed so to do.

eing so, I am of opinion that the magistrates have no
to strike out the case because the information did not
ertain statements which in my opinion it was not
that it should contain. There is no doubt that, when the
nt comes to prove the fact, it may become very
that he should be able to name some individual
idence, or be able to explain why he cannot. That,
nion, is all a matter of evidence. It is not a matter
ects the validity of the complaint or information.
in my opinion, be sufficient to justify a conviction
e proved that a person saw the person charged
or buying gold from some person who has disappeared,
me he did not know, and could not find, or could
fy and find. I do not think that a conviction under
umstances would be bad because no individual is
can be named. It might be a reason why the
s might doubt the accuracy of the evidence, and
ffect the weight of the evidence given, but that is all.
will be absolute with costs.

Order absolute.

or for informant: *Guinness*, Crown Solicitor.
or for defendant: *Cornish.*

J. M.

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F.C.

1903
October 1.

HITCHEN *v.* PHIPPS.

Justices Act 1890 (*No.* 1105), *ss.* 73, 155, 156, 187—*Information disclosin offence — Remand — Conviction — Jurisdiction — False imprisonment — A against justice of the peace.*

Where an accused person is brought before a court of petty session information, the fact that the information discloses no offence does not dep the Court of jurisdiction to remand the accused and detain him until he f bail for his appearance.

Where justices, acting on a mistaken view of the law, upon evidence whi insufficient to prove any offence, convict, and cause to be detained, an acc person who is before them on an information which in fact discloses no offe they are not liable in an action of false imprisonment as having acted wit jurisdiction.

Per HOLROYD, J. By sec. 187 of the *Justices Act* 1890 (No. 1105) the jus are legally bound to proceed to hear the information, however defective in f or in substance. They cannot therefore be subjected to any action for so doi

Semble, the test of jurisdiction is whether the justices had power to e upon the inquiry, and not whether, having done so, they acted rightl convicting.

MOTION FOR NEW TRIAL.

The plaintiff, John Hitchen, was, on 25th November 19 brought before the Court of Petty Sessions at Prahran, of wh Court the defendant, James Phipps, a justice of the peace, then a member, on warrant. The information charged "t the said John Hitchen, on the second day of November 1901 Prahran, did unlawfully use a certain shop, to wit, Gar tobacconist shop, for the purpose of betting with persons res ing thereto." On the case being called on, Hitchen was reman by the defendant, but was, he alleged, detained in Court several hours, pending bail being found for his appearance the following 2nd December 1901.

On the latter date, the defendant, purporting to act a justice, caused the plaintiff to be detained, and, as it was alleg assaulted and convicted the plaintiff of the said charge, fin him 20*l.*, in default 3 months' imprisonment, with costs. Hitch was again detained in Court until bail could be found. T conviction was, in March 1902, quashed by the Full Court (*v O'Donnell* v. *Hitchen* (*a*), where the grounds of the Full Cou decision will be found). The plaintiff thereupon brought t

(*a*) [1902] 27 V.L.R. 711.

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ainst the defendant for false imprisonment, alleging defendant had acted wholly without jurisdiction, and 500*l.* damages. The defendant pleaded not guilty by 3 Vict. No. 1105, sec. 165), and, without admitting any paid into Court the sum of 5*l.*, as sufficient to satisfy iff's claim.

tion was tried before Hood, J., who entered a verdict efendant with costs, on the ground that the amount Court was sufficient. His Honour added—"I also here was any want of jurisdiction."

g the trial it was shown that the information and vere not signed by the defendant. Hood, J., refused to dence as to the remand on 25th November, on the at the information had not been taken by defendant, the only want of jurisdiction alleged arose after rnment.

of motion for a new trial was given on various which, having regard to the decision of the Full Court, cessary to set out.

for the plaintiff, in support of the motion, referred to *Evidence*, 602; *Scott* v. *Sampson* (*b*); *O'Donnell* v.); *De Faro* v. *Rankin* (*d*).

er for the defendant, to oppose, referred to the *ct* 1890, secs. 73, 155, 156, 187; *Cave* v. *Mountain* (*e*); *rkinson* (*f*); *Laurenson* v. *Hill* (*g*); *R.* v. *Bolton* (*h*); v. *Sparke* (*i*); *King* v. *Remnant* (*k*); *Coulson* v. *h* (*l*); *Boyett* v. *Boyett* (*m*); *Rodgers* v. *Richards* (*n*).

n reply.

YD, J. This was a motion for a new trial of an action by John Hitchen against James Phipps, J.P., on the at the plaintiff was charged with a pretended offence; peared before the Court of Petty Sessions at Prahran,

2] 8 Q.B.D. 491.
.L.R. 711.
9] 25 V.L.R. 170.
0] 1 M. & G. 257.
1] 20 L.J. (M.C.) 208.
r. C.L.R. 177.
(*h*) [1841] 1 Q.B. 66.
(*i*) [1853] 22 L.J. (M.C.) 67.
(*k*) [1825] 1 R. & R. 136.
(*l*) [1894] 2 Q.B. 316.
(*m*) [1897] 19 A.L.T. 41.
(*n*) [1892] 1 Q.B. 555.

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Holroyd, J.

of which defendant was a member; that he was there remand
was subsequently brought up before the same justices again a
convicted; and that therefore he was twice unlawfully assaul
and imprisoned under the assumed authority of the defenda
He alleged certain special damages incurred in defending hims
and the defendant paid 5*l.* into Court in full satisfaction,
admitting any liability. My brother Hood found a verdict
the defendant with costs on various grounds, but added—"I a
doubt whether there was any want of jurisdiction"—that is
say, he doubted whether the magistrate had not suffici
jurisdiction to proceed to hear and determine the preten
charge. We think that sec. 187 of the *Justices Act* 1890 sh
that the justice had jurisdiction. He may have made a mista
he did make a mistake; he was wrong in his law; but, acco
to the interpretation which we put upon this section—the sa
interpretation having been previously given to it by others—
think the justice was bound to proceed to hear this informat
though it may have been imperfect and bad. The section sta
—"On the hearing of any information or other proceedi
before any court of petty sessions or justice no objection sl
be taken or allowed to any information warrant or summons
any defect therein in substance or in form." (His Honor r
the rest of the section.) Whatever may be the meaning of
latter part of the section, it provides that no objection is to
allowed or shall be taken to any information for any defec
substance or in form. The justice is legally bound to proc
He cannot therefore be subjected to any action for so doi
In the information upon which the justices in this c
proceeded no offence was actually charged. It was intended
charge an offence. The justice believed it was correctly laid
the information, and proceeded accordingly. But the inform
tion was not correctly laid; the language was insufficient
charge an offence. We think that there is undoubtedly a def
in substance—that the information charges as an offence t
which is not an offence. There are only two kinds of defect
the one in substance, the other in form. These are the o
two. This is not a defect in form; it is a defect in substan
There is no mode by which the defect can be cured. T

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e has to go on. Going on, he may make mistakes, but iable on the ground of want of jurisdiction. That, we poses of the whole action. The learned Judge dismissed because he thought the 5*l.* paid into Court sufficient. s this motion for a new trial.

KETT, J. It appears to me that the magistrate had n to deal with that which was the subject of this ion, as to whether this man had committed the offence in a certain place, and that he had jurisdiction I pears from *O'Donnell* v. *Hitchen* (*o*), where, if the had been sufficient to show that the occupation of a he present plaintiff was with the permission of the the shop, the case could have proceeded, and the on might have been amended. That which caused the gs to be utterly abortive, and was the reason of the t setting aside the conviction, was the insufficiency of ce. The magistrate acted upon a section of the Act, sed that the offence described in that Act was properly in the information before him. It happened not to be ppened that there was an insufficiency of evidence a material ingredient to be proved in the offence. it would have been wrong to amend the information it conform to the language of the Act. But he was n investigating a charge having reference to a matter h a justice clearly had jurisdiction. The mere failure e evidence to show a necessary ingredient of that l not deprive him of jurisdiction. I think, therefore, not be said that he was acting without jurisdiction.

S, J. I am also of opinion that this motion should be An information had been laid against the plaintiff. information he had appeared before the magistrate. nation purported to have been laid under sec. 51 of the *fences Act* 1890. The Full Court, after a good deal of arrived at the conclusion that that information did nt to stating an offence. But when the plaintiff before the magistrate on that charge, the magistrate,

(*o*) 27 V.R.L. 711.

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Hodges, J.

under sec. 187, or by reason of the operation of sec. 187, w
in my opinion, bound to deal with it. That section forb
magistrates to listen to any objection to an information on
ground of any defect in substance or in form. The informat
was laid; plaintiff was there; the magistrate was required
act. Had he jurisdiction? In my opinion, if he had decli
to act, a *mandamus* could have issued against him to com
him to act, and he would have been bound to hear
determine the complaint. He remanded the plaintiff, and
that remand he has brought his action. Damages, he alle
should have been given in respect of that remand. The lear
judge refuses to give damages in respect of that remand, and
my opinion, rightly so. The justice was under the necess
of dealing with the charge before him. He had to hear
determine the application for a remand. He dealt with
and whether he granted that application for a remand
refused it, it was a matter entirely within his discretion.
is not necessary to determine whether there was in the con
tion any excess of jurisdiction, because the learned judge i
opinion that the amount paid in is sufficient, even if there w
any excess of jurisdiction. But I very greatly doubt whet
there was any excess of jurisdiction. The prosecution
alleging an offence under sec. 51 of the *Police Offences*
The present plaintiff was denying the charge. The magistr
had to hear and determine that charge. If he had commit
an offence under that Act, undoubtedly he had jurisdiction
deal with it. It was alleged in argument that he had,
evidence was adduced to support it. That was a matter wh
the magistrate had to deal with, and I should be slow to arr
at the conclusion that, because he made a mistake, he
not jurisdiction. But that matter it is not necessary to d
with here. The decision of the first point is enough. I ag
that the motion should be dismissed with costs.

Motion for new trial dismissed.

Solicitor for the plaintiff: *Potts.*
Solicitor for the defendant: *Guinness,* Crown Solicitor.

J. M

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HOLROYD, J.

1903
September 18.

PERPETUAL EXECUTORS AND TRUSTEES OCIATION OF AUSTRALIA LIMITED *v.* THE ONIAL MUTUAL FIRE INSURANCE COMPANY ITED.

Costs—Taxation—Costs incurred before notice of claim—Costs incurred ssue of writ—Solicitor's charge for looking up authorities—Discretion of officer—Order LXV., r. 27 (9).

ncurred before notice of an intended claim has been served upon a cannot be allowed upon taxation as between party and party.
curred by a defendant after notice of intended claim, but before the rit in an action, may be allowed upon taxation as between party and r as the taxing officer considers that they would have been properly and ought to have been allowed if they had been incurred after the nent of the action, and that they were costs necessarily incurred for e of procuring evidence which could not otherwise have been obtained.
ing officer has a discretion to allow a solicitor's charge for looking up in a case in which counsel is employed.
officer's discretion under Order LXV., r. 27 (9), considered.

EW OF TAXATION.

laintiff's claim was as executor of one Johan Gerhard nmer for 1000*l.* upon an accident policy of insurance ed's favour issued by the defendant. The main defence the deceased had not died accidentally, but that, having insured his life in the defendant company and other s, he had deliberately committed suicide. Hoog- died on the 18th of May 1902, under circumstances to suicide caused by allowing coal-gas to escape ap in his bed-room. On the 19th May 1902, and on nt days, defendant's solicitors had attended upon who lived in the same house as the deceased, to eir evidence as to the cause of his death, and had ions made by experts of the gas-taps and gas, etc., in where he was suffocated, which was hired for the of making experiments. On the 30th May 1902 the made a claim on the policy, which was immediately d. On the 16th June 1902, the plaintiff wrote a letter ng proceedings to enforce its claim, and on the 21st 2 issued the writ against this defendant and against

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two other defendants against whom it had similar clai The hearing of this action was, by consent of the parties, stay pending the hearing of the action against one of the ot defendants. In the action that was tried, the evidence, collec as above-mentioned, was adduced on behalf of the defendant whose favour judgment was given; and thereupon notice discontinuance of this action was given on the 18th Decemb 1902.

Included in the defendant's bill of costs of the action w charges for work done between the 19th May and the date the issue of the writ inclusive. Plaintiff objected to all items in the bill for costs incurred before the latter date, and objection was allowed on the grounds "that the defendant only entitled to work actually and necessarily done in Supreme Court in this action after the issue of the writ, and to the date of discontinuance by the plaintiff (see *Robinson Malcolm and Co. Limited* (*a*) *re* the item 'Instructions Brief')"; and "that the items disallowed are not the ordin costs of action which commence with 'Instructions to sue' 'Instructions to defend' as the case may be: See *Pridmo Guide to Costs* (10th ed.), p. 104." The taxing officer t went on to say—"Although disallowing these charges, t appeared to me to be costs, charges, and expenses which wo have been properly incurred and allowable if they had b subsequent to the issue of the writ."

The defendant objected to the disallowance of these ite on the following grounds:—

"(*a*) That the taxing officer was wrong in deciding that defendant, on discontinuance by the plaintiff, was not entit to charge for work properly done prior to the issue of the w in the action.

"(*b*) That there was uncontradicted evidence before taxing officer that these items were charges in respect of w properly done, and which would have been properly allowed 'Instructions for brief' if the action had proceeded, and that consequence of the peculiar facts, it was absolutely necess that the work should be done at the earliest possible moment

(*a*) [1899] 5 A.L.R. 205.

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'hat such charges are fair and reasonable, and
y incurred in obtaining evidence for defence of this

axing officer's reasons for disallowing the defendant's
were :—
Objection disallowed for the reasons stated in allowing
objections to these items.
While agreeing with this objection, it did not appear to
could legally allow these costs as costs of the action,
ot then having been issued.
hese charges are not claims as 'Instructions for
n the action, but for procuring evidence prior to the
in anticipation thereof."
lant took out a summons to review taxation in
to the items in the bill for work done prior to the
ne writ, and also in reference to item No. 50—"Look-
d noting cases, etc., 1*l.* 1*s.* 0*d.*"—which was incurred
ssue of the writ, and the reasons of the taxing officer
owing which were that "it cannot be allowed as
ons for brief,' and, if allowable, it was premature."

in support of the summons—The items disallowed
and reasonable charges and expenses properly
n procuring evidence. Order LXV., r. 27 (9), is quite
to the period at which the charges may have been
It does not matter whether they have been incurred
after writ issued, if, in fact, the material collected can
to be, used in the contemplated action. Though the
had received no claim prior to 30th May, the taxing
found that the defence to the anticipated claim of the
was of such a nature as to warrant immediate action,
e evidence to be obtained was such as would disappear.
sis of the air in the room, for example, had to be done at
e cases which hold that costs incurred before action
re not costs in the cause were all decided before the
e Act, and before Order LXV., r. 27 (9). Under this
s held, in *Windham* v. *Bainton* (*b*), that the taxing

(*b*) [1888] 21 Q.B.D. 199.

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officer had "a discretion to allow charges and expenses p incurred by the defendant in procuring evidence wh plaintiff, having given no notice of trial, subsequently tinued the action." In England the parties were not s to begin to collect their evidence until notice of trial h given, and, before the passing of this rule, the practice to allow the costs or expenses of doing so. That case sh discretionary power the taxing officer now has. If collects evidence before the writ is actually issued, appropriates it to a particular action, he is entitled to imbursed in the action his costs and expenses in colle Otherwise he may say to the solicitor—"You must collect that evidence again." As to item 50, see *In re McEwan and Co. Limited* (c), where Madden, C.J., says to No. 5, 'Looking up the authorities, etc.,' I think that all justifiable. I think that a solicitor, who is calle suddenly to prepare the defence of persons assailed in th of proceeding, ought—not merely may, but ought—to s inform himself as to the case." *Cf.* also *Bartlett* v. *Higgi*

Dethridge, for the plaintiff, to oppose—An applicati the allowance of costs incurred before action has neve heard of in England. *Cf. Pridmore's Guide to Costs* (10 p. 104, the present edition of which is compiled by offi the Chancery Taxing Office. It is clear that at comm costs incurred in this way were never allowed. *Cf. Cu Platt* (e).

[HOLROYD, J. We can take that for granted.]

The defendant was indulging in a luxury, which the p should not be called on to pay for.

[HOLROYD, J. How can an expense be called a luxu be absolutely necessary for the case? How can the pe which it is incurred determine whether it is a luxury or n

Here there may be special circumstances that ma application of the general rule a hardship, but it woul most dangerous rule that a party should be entitled to

(c) [1903] 29 V.L.R. 114, at p. 119.
(d) [1901] 2 K.B. 230.
(e) [1864] 33 L.J. (C.P.) Willes, J., at p. 257.

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e writ issued, and charge the other party with them. 9) was never intended to widen the discretion of officer to the extent suggested. If it had been o revolutionize the practice that nothing (with the of the cost of one letter demanding payment) could for costs for work done prior to writ issued, it would done in express language. As to *Windham* v. *f*), the action was on foot, and the parties might very have been justified, though notice of trial had not n, in going on and getting their evidence ready. ate the costs incurred before ever proceedings were cannot be allowed. If a man chooses to incur costs e possibility of an action being brought against him, xury he must pay for himself. As to those items, at taxing officer was right in not giving such a wide rule 27 (9).

OYD, J. I entirely agree with you as to that, and I as to those particular items the taxing officer is right.]

tem 50, I am inclined to admit that the case of *In re Ewan and Co. Limited* (*g*) is an authority in point, ying that the work was premature the taxing officer t it was not necessary at that stage. Such work, sibly upon an emergency, is invariably done when the s into counsel's hands. Under the present procedure summons for directions, each side discloses what it o prove, and it is then time enough to look up the law ject.

D, J. I have already decided that the defendant's so far as they relate to the disallowance of certain of cannot be sustained. The costs charged for under s were incurred before any notice of an intended claim d upon the defendant, who was not justified there- ticipating the action.

the remaining items the disallowance of which ted to, so far as the taxing officer considered that ld have been properly charged for and ought to

.B.D. 199.

(*g*) [1903] 29 V.L.R. 114.

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have been allowed, if they had been incurred a
commencement of the action, and that they we
necessarily incurred for the purpose of procuring
which could not otherwise have been obtained, t
should have been allowed, and the objections to their
ance are so far sustained. With regard to the rule to
was referred—Order LXV., r. 27 (9)—it appears to me
old common law principle of not allowing as costs
party and party any costs (except the costs of one
demand) incurred before notice of trial, was entirely do
with, and that principle being done away with, th
officer is thrown upon his own discretion in asc
whether the charges and expenses were just and reason
properly incurred in procuring evidence. I have alre
that they ought to be limited to the time when an acti
have been reasonably anticipated. The taxing offic
clusion is very remarkable, and renders this quite a spe
This is a case in which it would have been practically i
to get the evidence which was necessary for the defen
the defendant had set about it at the earliest possible
and I see no reason why, if the evidence is necessary, a
costs incurred were necessary in procuring it, they sh
be allowed, although they happen to have been incurr
action, just as much as if they had been incurred after

I am very much puzzled as to some of these latt
because I do not know what is meant by them or by t
officer's reasons. Item 50 is "Looking up and noting c
As to that, I am inclined to think myself that it is a
discretion with the taxing officer whether he should
not allow something for the solicitor's trouble in lo
cases where counsel is employed. I can understand
would be quite unnecessary that he should in some cas
others it may be very important that the solicitor sh
up reports of cases. I think that is a matter for th
officer's discretion. As to the rest of the items, if th
officer thought them necessary he should have allow
I will send them back to him. If he has already c
them and thought them unnecessary, I think his dis

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should stand; but if, on the other hand, when he comes to consider them, he thinks they were properly incurred, they should be allowed.

Summons allowed in part.

Solicitors for the plaintiff: *Nunn, Smith & Jeffreson.*
Solicitors for the defendant: *Gillott, Bates & Moir.*

H. I. C.

HOLROYD, J.

1903

THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED *v.* THE COLONIAL MUTUAL FIRE INSURANCE COMPANY LIMITED.

[PRACTICE COURT.]

HODGES, J.

1903 *November* 30.

KANNULUIK *v.* MAYOR, ETC., OF HAWTHORN.

Appeal to Privy Council—Order in Council—Judgment respecting property or civil right amounting to or of the value of 500l.—Costs of repair of drain, subject matter of dispute.

The plaintiff brought an action against a municipality for causing damage by allowing water from a drain to overflow on to his property. The plaintiff recovered 250*l.* damages. Upon a motion by the defendant municipality for leave to appeal to the Privy Council under the Order in Council, affidavits were filed to show that the cost of repairing the drain so as to prevent the overflow would be considerably over 500*l.*; on the part of the plaintiff it was alleged that the cost should not exceed 150*l.* or 200*l.*

Held, that as the civil right involved was the right of the municipality to keep the drain as it was, and as in the opinion of the Court it would cost more than 250*l.* to put the drain structurally right, if the right claimed were denied there was a judgment involving a civil right amounting to or of the value of 500*l.*, and leave to appeal should be granted.

Semble, in arriving at the amount involved the Court should consider the case as one entirely between the parties to the particular action, without reference to threatened actions in respect of the same right by other persons.

THIS was a motion on behalf of the Mayor, etc., of the City of Hawthorn for leave to appeal to the Privy Council. The plaintiff Kannuluik brought an action against the municipality claiming damages on the ground that the defendant had allowed water to be collected or concentrated in a drain so as to cause a public nuisance, or so that the same overflowed and was cast upon the plaintiff's land; an injunction was also claimed in the action. The plaintiff recovered 250*l.* damages, but the injunction was refused. The Full Court upheld the judgment (*ante*,

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1903
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p. 308). The defendant now applied for leave to appea Privy Council. The affidavit filed on behalf of the d alleged that the judgment involved directly or indirectly respecting property or civil rights of the value of 5(was further alleged that another action had been con against the defendant by another person in respect concentration of water in the same drain.

There were numerous affidavits filed as to the cost o ing the drain which was the real cause of the damag affidavits of the experts for the plaintiff alleged that t could be made efficient for 200*l.*; the affidavits of the ex the defendant alleged that it would cost considerably o to remedy the evil complained of.

McArthur (*Isaacs, K.C.*, with him) for the defer support of the motion—The civil right which is involve judgment is the right to have the drain maintained as i at present without further expenditure. If the drain h repaired, then the defendant's affidavits should be accep the experts swear that it will involve an expenditure far ing 500*l.* to remedy the causes of complaint. Then another action pending which is practically governed decision in this case: *Bailey* v. *Mayor of Port Melbou Bendigo Waterworks Co.* v. *Thunder* (*b*).

Cussen (with him *Starke*) to oppose the motion— that another action is pending cannot affect the right t in the present action; the right involved must be between the same parties. The right to appeal r mutual, and it would be wrong to allow the defendant t because he was threatened with other actions when particular action in question the plaintiff would have right: *Wilcox* v. *Clarke & Co.* (*c*). The onus of proof is u applicant, and it is for the applicant to satisfy the Co the amount involved is 500*l.*

Counsel referred to *Brown* v. *Higgins* (*d*).

(*a*) [1888] 14 V.L.R. 260.
(*b*) [1870] 1 V.R. (L.) 123.
(*c*) [1896] 21 V.L.R. 752.
(*d*) [1900] 25 V.L.R. 691.

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HODGES, J. I cannot say that the facts stated in the affidavits are very satisfactory, or that I feel any great confidence that in arriving at the conclusion upon the facts I have arrived at the correct conclusion. The affidavits are those of a number of men eminent in their calling, and given on different sides, and are in direct conflict. I have, however, to determine this, whether under the Order in Council "the judgment decree order or sentence" involves "directly or indirectly any claim demand or question to or respecting property or any civil right amounting to or of the value of 500*l.*" Now the "civil right" which is really in issue here is the Council's right to have this drain as it stands. The plaintiff alleges that the drain as it stands is a wrong to him; the defendant council says it has a right to have that drain as it is. Is that a "right" amounting to or of the value of 500*l.*? There is a verdict that the drain is wrong, and the plaintiff has recovered 250*l.* damages. If the drain is wrong, and dealing with the case as one entirely between the plaintiff and the defendant—and I am inclined to think that that is the way I ought to deal with it—then I find that there is already a verdict awarding 250*l.* damages, and there is an obligation upon the council to alter that drain, and, so to speak, prevent it doing damage to the plaintiff in the future, or else to take the risk of a repetition of claims for damages. The amount that it will cost to put that drain right is alleged on the one hand as the amount which I should take into consideration, and on the other hand it is put as a matter of law that I should not consider that amount because the cost of putting the drain right does not by any means necessarily determine that the council will lose the sum so expended, and it will have a very much more valuable drain when the work is done. As a matter of law I think I am bound to take into consideration either what it will cost to put it into a condition so that it will not injure the plaintiff in the future, or the amount of damages the defendant will incur if they do not do so. And although to others in the district the new drain may be of more value when so altered, still the council desire to have it as it is, and it says that if it is wanted otherwise every penny it spends upon it is money expended not

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under its own will, except so far as it is coerced by the jud of the Court. I think I should look upon that as part value of the civil right they claim—a right to keep that where it is and as it is. With regard to the cost of put right the affidavits are conflicting.

(His Honor referred to the affidavits, and stated t thought the cost would be a great deal more than the a mentioned by the various witnesses of the plaintiff, and int that in his opinion the right involved amounted to mor 500*l.*)

Motion allowed on usual ter

Solicitors for plaintiff: *Westley & Dale.*
Solicitor for defendant: *Derham.*

W. H

HODGES, J.

1903
October 26,
November 30.

SAVAGE *v.* THOMPSON

Book Debts Act 1896 (*No.* 1424), *s.* 3—*Assignment or transfer of book deb registration of document — Invalidity — Insolvency — Mutual debts - right of—Insolvency Act* 1890 (*No.* 1102), *s.* 121.

Sec. 3 of Act No. 1424 is not restricted to assignments coming wi meaning of "assignments" as defined by the *Supreme Court Act* 189 intended to cover all assignments which purport to convey an equitable in debt.

The right to set-off in respect of mutual dealings under sec. 12 *Insolvency Act* 1890 is to be determined and fixed in respect of transactio ing at the insolvency, and, while no right of set-off can arise from a tr entered into after insolvency, yet the right of set-off may arise subseq insolvency out of a transaction which was initiated prior to insolvency.

THIS was an action brought by C. G. Savage, as assig the insolvent estate of John Scott, claiming a declaration the defendant, W. H. Thompson, that an agreement date January 1903, made between Scott and the defendan invalid so far as it purported to assign the book debts o to the defendant, and also claiming 102*l.*, a sum received defendant under the agreement. Under the order for dir an issue was directed as to whether the plaintiff was enti recover the sum of 102*l.* or any part thereof, and it was

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the Judge at the trial to make any declaration he saw fit as to the validity of the agreement. The defendant paid the sum of 47*l.* 16*s.* 9*d.* into Court, with a denial of liability, and gave a notice of set-off in the following form:—"By an agreement in writing, dated 15th January 1903, made between John Scott (the insolvent) and defendant, it was agreed that the defendant should purchase all book debts owing to the insolvent at a discount of 12 per cent., such debts not being over six weeks due to insolvent from the date of taking possession of the business of the said insolvent. The defendant accordingly paid to the insolvent, on 2nd February 1903, and before his insolvency, the sum of 237*l.* 19*s.* 1*d.* for such book debts, and defendant claims to set off so much of the said sum of 237*l.* 19*s.* 1*d.* as is sufficient to cover plaintiff's claim for 102*l.*"

Under the agreement between Scott and the defendant, which was made on the 15th January 1903, the vendor (Scott) agreed to sell to the purchaser (Thompson), for the sum of 300*l.*, his wholesale produce, fruit, wood, and coal business, together with the goodwill thereof and certain fixtures; the sum of 50*l.* was to be paid as deposit, and by clause 9 it was provided—"And it is further agreed between the vendor and purchaser that the latter is to purchase all book debts owing to the firm at a discount of 12 per cent. net such book debts not being over six weeks due to the firm of John Scott from the date of possession of the said business."

The sale was completed on 2nd February 1903, but the agreement was never registered. An order *nisi* for the sequestration of Scott's estate was obtained on the 13th February, and it was made absolute on 5th March 1903.

The amount paid into Court (47*l.* 16*s.* 9*d.*) was collected after the 13th February 1903. The balance of the total sum of 102*l.* was collected by Thompson before the commencement of insolvency.

The action came on for trial before Hodges, J.

Starke for the plaintiff.

Wasley for the defendant.

Cur. adv. vult.

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HODGES, J.

1903
November 30.

SAVAGE
v.
THOMPSON.

HODGES, J. By a document dated 15th January 19
Scott agreed to sell to the defendant certain stock-in-tra
business which he had been carrying on in Melbourne. T
clause of that agreement contains these words "and it is
agreed between the vendor and purchaser that the latte
purchase all book debts owing to the firm at a discount
per cent. net such book debts not being over six weeks
the firm of John Scott from the date of possession of t
business."

Under that agreement the defendant paid the pu
money and also the sum of 237*l.* for the book
Immediately the money had been paid Scott disappear
left the country, and was afterwards arrested and brough
to Melbourne. He was made insolvent, and the plaintiff
trustee of his insolvent estate, and he claims that the pro
of the 9th clause of that agreement is a transfer or assig
of a debt or book debts within the meaning of the *Book
Assignment Act* 1896; that it is invalid and of no effect
ever, not having been registered, and that consequent
moneys which the defendant has collected under it belong
the plaintiff, as such trustee, and should be paid over t
The first matter of doubt that I had was whether or not th
clause was a transfer or assignment within the meaning
Act. It is clear that the Legislature did not mean to conf
operation of that clause to what would be an assignmen
book debt at law; that, of course, could never be effectua
notice had been given to the debtor and the debtor had a
to the notice and agreed to pay—in other words, unless the
been a novation. If the Act were to be confined to such
ments as came within the definition of assignments und
Supreme Court Act which validates assignments where
has been given, it would seriously prevent the operation
Act, and practically render it nugatory, because all that a
had to do, who did not want to register the transaction,
be merely to omit to give the requsite notice to the debto
my opinion, consequently, the provisions of sec. 3 of th
Debts Act apply to every instrument which conveys wh
been called in the past an equitable interest in the debt

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which assigns the debt in equity. At first I had some little doubt as to whether or not this did in equity assign an interest, because it says "it is further agreed" that the purchaser *is* to purchase.

It does not say that he *does*, but leaves it as if it were something to be done in the future. However, looking at the whole scope of the agreement, it is clear that that was the only document to be executed, and the parties meant thereby, one to sell, the other to buy. I think this is borne out, because the Legislature makes it apply to *all* assignments, whether absolute or conditional. In one sense it might be said that this was conditional, because the purchaser was not to have the stock-in-trade unless he paid this sum, and in that sense it was conditional. In that sense all assignments are conditional. I think the Legislature meant the section to apply to this document, and in my opinion it is an assignment, and consequently I feel I should accede to the argument that it is invalid, as the section provides that it is to have no validity in law or in equity until registered. I therefore, so far, declare the assignment invalid.

The next question that arose was as to whether or not, even assuming the assignment invalid, the trustee is entitled to get this money. It was urged on behalf of the defendant that this assignment is now utterly invalid—it is of no effect in law or equity—and consequently he has got nothing for the money he has paid, and having got nothing for the money paid there is a debt due from the insolvent to him which he is entitled to set off against the plaintiff's claim. In my opinion the fact that the defendant has got nothing is due to the omission on the part of Scott, the vendor, to procure registration of this document. According to the Act and the schedules thereto it is not the assignee who is to procure registration, it is the assignor. In the first schedule the form is set out of the notice which has to be given; that notice has to be signed by the assignor or transferor, and it is a notice to the Registrar-General that "I hereby give notice"—that is, the assignor—and provision is made in the Act for the creditors of the assignor opposing the assignment. Directly Scott became insolvent it became from that moment utterly

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1903
SAVAGE v. THOMPSON.

impossible for him to give notice and to procure regist
the assignment, and all those things passed to the t
insolvency. There was therefore a failure of considera
from the moment of insolvency there was a debt due
insolvent to his assignee. It was urged by counsel
of the plaintiff that until after the insolvency there was
that sec. 121, although it does not in express ter
impliedly fix the time at which the mutual debts a
determined as the time of insolvency, and that in this ca
not until the insolvency was complete that the debt
There is no doubt that sec. 121 does not fix any time
the mutual debt or mutual credit must have existed, bu
was placed on the case of *In re Gillespie* (*a*), which dec
where there are mutual dealings between a debtor
creditor the line as to set-off must, as a general rule, a
absence of special circumstances, be drawn at the da
commencement of the bankruptcy. The date of the co
ment of the insolvency is the time at which the line of
tion is to be drawn; that is the way it is stated in that a
I am inclined to think if I accepted that rule as
without any reference to special circumstances that it w
leave the defendant in this case entitled to set off th
Scott to himself, which accrued at the very mo
insolvency. The moment of insolvency fixes the one
well as fixes the right of the other party to have that
declared invalid.

There is, however, a later authority upon the ques
that authority, in my opinion, clears up any possible do
might otherwise have existed, and in my opinion the tru
that while the line of demarcation may be drawn at the
of insolvency it is the line of demarcation with respect
actions, and while no right of set-off could arise from t
action entered into subsequently to insolvency, yet t
of set-off may arise subsequently to insolvency out
transaction which was initiated prior to insolven
authority I refer to is the case of *Sovereign Life Assur*
v. *Dodd* (*b*). (His Honor stated the facts of the case

(*a*) [1885] 14 Q.B.D. 963. (*b*) [1892] 1 Q.B. 405.

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case went to the Court of Appeal (c), and at p. 581 Bowen, L.J., says:—"Further, the defendant had the company's money in his pocket, and was entitled to make use of a counter-claim, or, more correctly, a set-off, against any action which the company might bring against him to recover the money; he could not sue the company or counter-claim against them in the strictest sense of the term because of the liquidation; but he could say that the transactions had resulted in mutual debts, and that he had a right to set off the debt of the company to him against his own debt to the company. That was his position when his policies matured, and he could be in no worse position when the company brought their action; he was entitled to set up his defence of set-off, which is so large in amount as to be a bar to the company's claim. That being so, I agree with the Master of the Rolls that it is unnecessary to consider what would have been the position of the parties had there been only bankruptcy proceedings and no action had been brought."

That, in my opinion, is the position of the defendant here; he is entitled to set off the amount due from the person whom the plaintiff represents against the claim made by the plaintiff. The only matter is one of detail as to the amount. I declare the agreement invalid, and the defendant is not entitled to retain any of the moneys he has received after the insolvency. He is entitled to set off the money due to him against the money that was due from the insolvent, but the moneys collected afterwards are the moneys of the plaintiff, and he must pay them over to the plaintiff and merely rest upon his right to prove against the estate for the balance. As to the question of costs, I think the procedure under which these issues have been settled is unsatisfactory, but I think I ought to direct that the plaintiff should get the general costs of the action, the defendant to get the costs in connection with the claim of set-off, and I must leave it to the taxing officer to adjust such costs as best he can.

Solicitors for the plaintiff: *Bruce & Robinson.*
Solicitors for the defendant: *Gaunson & Lonie.*

W. H. M.

(c) [1892] 2 Q.B. 573.

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F.C.

1904
February 2.

DUNCAN *v.* DUNCAN.

Divorce—Marriage Act 1890 (*No.* 1166), *ss.* 74, 83, 86 - *Discretionary bar—Consolidating Acts, effect of.*

Sec. 86 of the *Marriage Act* 1890, which empowers the Court in its discretion under certain circumstances to refuse to grant a decree of dissolution of marriage, applies to all decrees of dissolution under the Act.

THIS was a suit instituted by George M. Duncan for divorce on the ground of desertion by his wife for three years and upwards. After the decree *nisi* had been pronounced it came to the knowledge of the Attorney-General that the petitioner had been himself guilty of adultery both before and after the decree *nisi* had been made. The Attorney-General thereupon intervened, and the matter was argued before Hodges, J. There being some conflict in the decisions as to whether sec. 86 of the *Marriage Act* 1890 was applicable to cases of divorce founded upon the new causes of divorce created by the later Act, known as "Shiels's Act," the matter was referred to the Full Court, and was again referred to a special sitting of the Full Court, and now came on for argument.

O'Hara Wood for the Attorney-General—Although the Attorney-General has intervened and brought before the Court the fact of the petitioner's misconduct, yet it would appear that the Court has in this case no power to exercise the statutory discretion which is given by sec. 86 of the *Marriage Act* 1890. In the Act as it was originally passed in 1860 sec. 86 was a proviso to what is now sec. 83. It was separated in the Act of 1864 and stood as a separate section. Then in 1889 a new Act, No 1056, "Shiels's Act," was passed which introduced new grounds for divorce, and so far as the grounds of divorce were concerned and the effect of the decrees thereon it was self-contained. It provided its own limitations upon the granting of the decree, and confined such limitations to the conduct of the petitioner contributing to or inducing the acts complained of. See sec. 12 of Act No. 1056, now sec. 74. It was not intended to have in existence also the general statutory bar which was in the Act then in force and which was applicable only to the grounds of

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divorce referred to in that existing Act. The words "such decree" in sec. 70 (now sec. 86) at that time could only refer to decrees for causes then existing, and there is no reason by the mere consolidation of the Statutes to give those words a wider meaning and make them apply to *all* decrees granted under the consolidated Act. The consolidating Acts have not altered the law.

Hobday for the petitioner—Full effect should be given to the words of sec. 74—"The Court shall pronounce a decree dissolving the marriage." The only limitation upon that legislative direction is in the same section, where it is provided that if in the opinion of the Court the petitioner has contributed to the wrong complained of the petition is to be dimissed. The further limitation contained in sec. 86 aims directly at the one ground of divorce, "adultery," and stands quite apart from the new grounds of divoree introduced by the Act No. 1056. The Attorney-General should pay the costs of this reference, because after having intervened his sole argument has tended to show that such intervention was wrong, and that the Court cannot exercise this discretionary bar.

MADDEN, C.J. In this matter the Attorney-General has intervened, and by such intervention has certainly done service by pointing out to the Court what was unknown to the Court before, that the petitioner before the decree had been made absolute had committed adultery himself. The Attorney-General, however, seemed to think that this fact did not matter in point of law, having regard to what is called "Shiels's Act," and although we have been puzzled by the Attorney-General intervening and arguing to this effect, still there was good reason for the actual intervention.

The question is whether those sections which have been referred to in argument, which are general in their operation, and which in effect are sections of procedure in a large degree for the administration of the marriage and matrimonial jurisdiction, which have always prevailed, do or do not apply to the new causes of divorce introduced by "Shiels's Act?"

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Under the old sections as they originally stood th
certain causes of divorce created and establishe
Act, and the Act itself provided that the litigati
be conducted by petition, and that certain evider
be presented to the Court, and then sec. 83 prov
the Court is to do when satisfied upon the evid
the case of the petitioner has been proved. (H
read the section.) It says—"The Court shall
a decree declaring such marriage to be dissolved."
have to deal with sec. 86, which, as the Act now
somewhat dissevered from its original position, for
first a proviso to what is now sec. 83. (His Honor re
The contention, as I understand it, is this, that the wo
decree of dissolution" mean a decree for the causes of
this Act previously declared—that is, in the Act
originally passed and before consolidation—and that t
and do not refer to those causes of divorce introduc
later Act—"Shiels's Act." In my opinion the wo
decree" do not mean a decree as based upon this or
ground of divorce, but simply a decree of dissolution
Court is called upon to pronounce in any appropriate
sec. 83, where it is said the Court is bound to grant
dissolution, this is made dependent upon sec. 86, whic
that that is to be so unless certain things are fou
Court, and then in that case the Court shall not be
grant a decree. It is said that the word "shall" in
in sec. 74 has a finality about it. But it is quite clea
Legislature has said that the original rule is that the
a decree if the case is proved, but the Court shall not
to pronounce such decree if the petitioner has been
adultery. "Shiels's Act" was introduced while the ol
that rule was in force and had been well understood.
Act prescribed a new series of causes of divorce not
recognized by the Legislature or by the Court, an
were new they presented special features whi
not attach to the old Act. So in sec. 74 new
was made. (His Honor read sec. 74.) Now the
lines of the second last clause of that section mer

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the words which occur in the first and last lines of sec. 83. The earlier words of that clause in sec. 74 are new limitations appropriate to the new causes of divorce mentioned in the section. The substance of both sections is that if the case of the petitioner setting out either the old or the new causes of divorce shall satisfy the Court as being proved, the Court shall make a decree dissolving the marriage. Then we think that sec. 86 is a general section which applies to all causes of divorce, and it provides that the Court shall not be bound to pronounce the decree if, etc. I think that the words used show clearly that the intention of the Legislature was that sec. 86 should apply to all causes of divorce, whether the old ones or those introduced by "Shiels's Act." If the new Act had seen fit to enact by definite words that sec. 86 should not apply, of course there would be no cause to discuss the matter. But one sees no reason why the particular grounds of divorce created by the new Act should have a privilege and an advantage which the old causes under the old Act would not have. It seems absurd to say that one class should have an advantage over the other.

For these reasons we think that the effect of sec. 86 is to give the Judge who tries the case a discretion whether he will or will not pronounce a decree of dissolution where the petitioner is shown to have committed adultery. In this case it will be for the Judge who tried this case to determine whether such discretion should be exercised or not.

(His Honor then dealt with the question of costs, and no costs of the reference to the Full Court were allowed.)

HOLROYD, J. I concur in the judgment of the Court generally, and I desire to say that I think the words "such decree" in sec. 86 mean any decree of dissolution of marriage, and that is shortly the ground of my decision.

A'BECKETT, J. I think that if when the "Shiels Act" came into force this discretionary section had not applied, then the mere alteration of the position of the clauses in the consolidating Act would not have produced a change in the law, and would not have given a discretion which had not previously existed.

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I go back therefore to the law as it stood when the "Shiels Act" passed. When the "Shiels Act" passed it is material to observe that under the *Marriage Act* of 1864 there were distinct sections in force (secs. 69 and 70), of which sec. 70 had originally been a proviso to sec. 69. The matters mentioned in sec. 70 had, generally speaking, reference to the ground of adultery, but there was then a section saying that the Court upon being satisfied with the evidence shall pronounce a decree, and then came sec. 70, saying that notwithstanding that provision the Court shall not be bound under certain circumstances to pronounce such decree. Then the "Shiels Act" comes into force, and it provides new grounds for the dissolution of marriage, and it contains a section very much the same as sec. 69 of the old Act, winding up with the same words, and says nothing as to sec. 70, but it does say, in sec. 14, that so far as severally applicable the provisions of the Act of 1864 shall apply to proceedings under the new Act. It is clear, too, that sec. 71 of the Act of 1864, referring to alimony, etc., would apply to the "Shiels Act," and the words "such decree" in sec. 71 apply to a decree under "Shiels's Act," and therefore there is no reason why in sec. 70 the words "such decree" should not apply to a decree on one or any of the grounds in "Shiels's Act," unless indeed there was something distinctly to exclude it. There was no reason for excluding it, and it was not excluded. Therefore, altering my previously expressed opinion, I do not think there is sufficient expression of intention to be found in "Shiels's Act" to deprive the Court of the discretion it before possessed.

HOOD, J. When the "Shiels Act" (No. 1056) was passed it was enacted that it should be "read with and construed as part of the *Marriage and Matrimonial Causes Statute* 1864." No provision was made as to whereabouts the new section creating new causes for divorce should appear, but it is to be read together with the old sections. If read together, the only question is whether there is anything in the new section incompatible with the old sections, and I can see nothing in the new Act incompatible with the statutory discretionary power already existing. Subsequently the Legislature proceeded to arrange the

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order of the clauses in the consolidating Act. That being done, "such decree" in sec. 86 means any decree in any suit. Sec. 85 of the consolidating Act of 1890 is taken from the new Act, and that is placed immediately preceding the discretionary power given in sec. 86, intimating that the law was, in the opinion of the Legislature, that the discretionary power applied to all grounds of divorce. In my opinion, even if the consolidating Act of 1890 altered the law, the Court would be bound by it. No doubt is was not intended to alter the law, but we must read an Act as it stands, and give effect to the language it actually uses. Sec. 32 of the *Acts Interpretation Act* is merely a saving of existing rights. That being so, I agree in the judgment of the Court.

Solicitor for petitioner: *Hobday.*
Solicitor for Attorney-General: *Guinness*, Crown Solicitor.

W. H. M.

BROADHURST AND COMPANY LIMITED *v.* ROBINSON.

A'BECKETT, J.
1903
December 10.

Master and servant—Principal and agent—Duration of service—Notice of determination—Remuneration by salary and commission—Future commission, right to.

A company in England engaged in fulfilling orders sent from Australia to the company, agreed with A. that he should act as the company's agent in Australia, and that he should receive a salary at the rate of £150 a year, and in addition a certain commission on all orders executed by the company in Australia.

Held, that the engagement of A. by the company was a yearly engagement, terminable upon six months' notice, ending at the expiration of the year.

The company terminated the agreement by one month's notice, but in an action for breach of agreement it paid six months' salary into Court.

Held, in a claim for damages for breach of the agreement, that A. was entitled to his salary in lieu of notice, and to commission for the period for which the notice should have been given, although he had, by virtue of the notice of determination of agreement actually given, ceased to act as agent for the company.

TRIAL OF ISSUE.

Broadhurst and Company Limited, an English company, brought an action against Phillip Robinson to recover a certain sum of money for goods sold and delivered. Robinson counter-

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claimed for one year's salary and one year's commissio to be due to him. Judgment under Order XIV. for th having been entered upon the counter-claim, the follow were directed, and were tried before A'Beckett, J. :—

(1.) What agreement (if any) was made between th and the defendant ?

(2.) What notice (if any) was necessary to determ agreement ?

(3.) Is the defendant entitled to any damages, commission under the agreement or by reason of an thereof, and if so how much ?

It appeared that the plaintiff company had agreed defendant that he should act as its agent in Australi sale of the plaintiff's goods, and should be paid a 100*l.* per annum, afterwards increased to 150*l.* pe together with a commission of 2½ per cent. on one class and 5 per cent. on another class of orders for goo company. The agreement was to commence on the 1st 1896. The parties acted upon the agreement for some disagreements having arisen as to the way in which the was carrying on business, the plaintiff company, on February 1902, gave to the defendant the following "We shall withdraw agency on 31st March." The replied that he should require a much longer notice. T tiff company in its claim gave the defendant credit for si salary in lieu of notice. The defendant, during the cu the agreement, acted as agent for several other abroad. The counter-claim was for a full year's salar a full year's commission, calculated on the basis of th commissions earned in preceding years, which the pa agreed should be fixed at 12*l.* 10*s.* per month. After t of the 28th February 1902 the plaintiff company con carry on business in Australia.

Schutt for the defendant—The engagement was a ye commencing from 1st October 1896, and could only be ated by six months' notice, expiring on 1st October in e The defendant was a yearly servant, and must be taken

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oyed until 1st October 1897, and after the termination
r, if nothing further was said, the employment was to
r another year: *Leake on Contracts* (5th ed.), p. 473;
Wimmera Fellmongery Co. (*a*); *Buckingham* v.
); *Williams* v. *Byrne* (*c*); *Beeston* v. *Collier* (*d*);
ase (*e*). The defendant is therefore entitled to full
the year and to full commission, because he was
the salary together with commission, and there is no
y he should not be allowed to prove his loss arising
ch of the contract: *Patent Floorcloth Co.* (*f*);
American Digest, p. 991 (16). The case of *Ex parte*
g) is not applicable to this case, because there the
had ceased to carry on business, and commission was
ble upon business if carried on.

for the plaintiff company—The defendant was not a
the ordinary acceptation of the term. He is more
described as a mere agent, and a mere agency can be
any time. An agent employed as the defendant was
be considered a clerk or servant in the criminal law:
(*h*). The agreement here entitled the defendant to do
hat he pleased. The plaintiff company had no control
and could not issue any orders directing what he
, and there was nothing in the agreement which
the defendant to act in the capacity of a servant, or
vented him from stopping his work at any time he
that the contract in this case is distinct from the
referred to in the cases cited on behalf of the
In *Creen* v. *Wright* (*i*), where a captain of a ship
nted at a salary of so much per annum, it was held
uld be dismissed with reasonable notice at any time.
like the present one month's notice is a reasonable
any rate, the defendant is not entitled to commission
has not earned, because the plaintiff company was not

9] 5 V.L.R. (L.) 362.
2] 46 L.T. 885.
7] 7 A. & E. 177.
] 4 Bing. 309.
] 16 L.T. (N.S.) 637.
(*f*) [1872] 41 L.J. Ch. 476.
(*g*) [1870] L.R. 5 Ch. 737.
(*h*) [1861] 30 L.J.M.C. 81.
(*i*) [1876] 1 C.P.D. 591.

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bound to execute any order which the defendant might
and in the case of *Ex parte Maclure* (*supra*) it was dis
held that the engagement left the company free as to the
of its business, and the agent had no right whatever to
to the company what business it should carry on. The d
was not based at all on the ground of the company b
liquidation. In *In re London and Colonial Co.* (*k*)
commission was disallowed. In *Rhodes* v. *Forwood* (*l*)
held that there was no implied condition that the co
should continue to carry on its business for the benefit
agent during the period of the engagement.

He also referred to *Ogdens Ltd.* v. *Nelson* (*m*), citing *M*
v. *Trevillion* (*n*).

A'BECKETT, J. This case is concluded by autho
one branch. It is clear that there was an engageme
a year, a yearly engagement. The defendant was e
by the year. I think that is perfectly clear, and there
evidence of any usage or custom here as to the notice
persons in this class of business are entitled to receive.
therefore thrown back upon the rule which has been
upon in several of the cases cited by counsel. Those auth
show that if in such an engagement the year go
and nothing is said as to a renewal, but the emplo
continues, such employment will be presumed to be for a
year. It is not as if this form of engagement wa
particularly out of the way or an exceptional form. It a
to be a recognized rule, and I should say one that is not
means unreasonable, that supposing he had been engage
clerk or manager of a business having to attend to such b
at a particular place, the engagement would be as I have
above.

Then it was urged that because this man is called an
and appears to have indefinite obligations with refere
his employment, that I am to regard the contract, not
constituting employer and *employé*, but as that of princip

(*k*) [1869] L.R. 7 Eq. 550.
(*l*) [1876] 1 App. Cas. 255.
(*m*) [1903] 2 K.B. 287, at p.
(*n*) [1902] 7 Com. Cas. 201.

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so taking it out of the ordinary rule of employment, aid it stands upon a ground of its own, and that the may at any time, without any liability as to com- determine the relationship. I do not accede to that ere was no definition of what the defendant had to ve nothing before me to show what were the upon his time, how his office expenses were by this agency. I think it is only reasonable to by the employer agreeing to pay a fixed sum per here was a definite duty attached to Robinson's hich, if not performed, would disentitle him to be paid and that as a matter of contract Robinson felt himself devote a certain portion of his time and to incur expenditure to do that which he was paid to do. I evidence before me to show what that was, but ly with the terms of his employment he could not, for have lived in a house on the Esplanade and smoked his ay and considered that he was entitled to his salary. re duties involved which if not performed would y claim he had for remuneration. So, although the indefinite, I do not think that a different rule should this employment than to others of a more definite I do not think that the mere fact that the relation- een the parties could not be accurately described as aster and servant prevents the ordinary rule of law I do agree with this, that if it were something ominal, involving no obligations on the part of the ployed, the rule as to notice might be different.

iew I take of the case is that the defendant is o 150*l.* for the year ending in October of 1902, as alary. Then his remuneration was to be not merely t also commission, which was at a certain percentage mount of sales of the company's goods to certain s; I presume that mode of payment was arranged on sition that the person employed would exert himself to the business transactions of the company. Then it hat the average of the earnings in respect of the com- gained was 12*l.* 10*s.* per month. Robinson now sues

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and demands, not only the 150*l.* as salary, but also th commission at the average rate of 12*l.* 10*s.* per month. H not show that he would continue to receive commission a rate; what he would receive would be shown by examini plaintiff's books. It is not shown, however, that the num value of orders from the purchasers of the company's goo not continue as before, and it is not argued that, as a ma fact, it would not be right to assume that, if the emplo had continued, he would not have received the average remuneration.

[*Moule*—Nothing is known of the amount of business since the notice was given.]

The contention has been that inasmuch as the co might, without breach of contract, have declined to dea these customers, the defendant has no right to ge commission. I fail to see the force of that argument. I th the case has been shaped (the parties most sensibly avoiding into lengthy accounts), and from the evidence before m I am entitled to come to the conclusion that 12*l.* 10*s.* per will represent what he would have earned. I have been re to cases in the winding-up of a company, where, in som analagous circumstances, the commission was disallowed. is, however, this essential difference, that in those cas commission could not, in fact, have been earned, the co there not being in a position to carry on business at al payment of commission depended upon their being able to on the business. The company in those cases did not co to carry on the business; at all events those cases conclude this point by any means—they are plainly distin able. I think therefore the defendant, who is the plai the counter-claim, is entitled to his full year's salary a full commission for that year. There has been some pa and I leave the parties to adjust the difference.

Solicitors for plaintiff company: *Moule, Hamilton & K*
Solicitors for defendant: *Wilmoth & Son.*

W. H.

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REX *v.* DOWSEY.

F.C.

1903
November 5.
December 14.

Larceny—Fixtures—Detachable amalgam plates—Larceny at common law—Crimes Act 1890 (*No.* 1079), *ss.* 97, 307.

A. was presented and convicted of feloniously receiving, knowing the same to have been feloniously stolen, a copper plate, which was an essential part of an undoubted fixture (a ripple table), but was for its complete use intended to be and was in fact periodically detached.

Held: **(*a*) That the plate was itself a fixture, and therefore could not be the subject of larceny at common law. (*b*) That the conviction for receiving must be quashed.**

Semble **(*per* MADDEN, C.J.) The conviction could not be sustained under secs. 97 and 307 of the *Crimes Act* 1890.**

CROWN CASE RESERVED.

This was a case reserved by Madden, C.J., at the Bendigo Assizes.

The case was as follows:—

"The prisoner Dowsey and another, Collins, were presented at the Assizes at Bendigo, holden before me on the 20th day of October 1903, on two counts—

"1. Larceny of one copper plate; and

"2. Feloniously receiving the same copper plate, well knowing the same to have been theretofore feloniously stolen.

"The copper plate in question was an essential part of a ripple table, forming an appendage of a quartz-crushing battery. This table was shown by the evidence to be a solid structure, framed together, with legs which were fastened to a solid wooden foundation, firmly let into the ground, and so formed that its upper tabular side sloped somewhat from one end to the other. Across it were certain cleats, called ripples, and at each ripple there was attached a copper plate. The purpose of this is that, as the stuff crushed by the stampers flowed over the table mixed with water, it encountered quicksilver spread over the table, which amalgamated with any gold which might be in the crushed stuff, and when this amalgam reached the copper plates, the quicksilver having a chemical affinity to copper, the amalgam attached itself as an encrustation to the copper plates, which at suitable periods were removed and treated by a process of cleaning and smelting, so that the quicksilver was evaporated

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and the gold obtained. The copper plates, when clean
then replaced on the ripple tables for further use as before

"In the present case, the ripple table was undoubt
fixture, and the copper plate in question was nailed to it
end with small nails, and was caught at the other end
a cleat of wood, which was keyed down, *i.e.*, clamped do
some sort of a screw clamp, as I understood.

"The evidence showed that a padlock, which locked
over the ripple table, was broken by the person or perso
removed the copper plate; and that the copper plate ha
forcibly removed by prising it up at the nailed end, an
forcibly dragging its other end out from under the cleat
held it in position; and the copper plate, when so severe
carried away.

"At the close of the Crown case, counsel for the pr
raised the point that the whole table, including the coppe
so fastened as aforesaid, was a fixture, and so part
freehold, and that consequently the copper plate was
chattel, and could not therefore be the subject of larceny.
much disposed to agree with this view; but, as althou
copper plate when in situation on the table was firmly fa
to it with nails, and those nails had to be forcibly
whenever it was desired to detach the copper plate, the
purpose of the copper plate involved its being removed fr
table from time to time and again restored to it, I ente
some doubt, and so I agreed to reserve a case for the opi
the Full Court.

"The jury acquitted both prisoners on the first cou
acquitted the prisoner Collins on the second count, but co
the prisoner Dowsey on that count. I sentenced the p
Dowsey, but respited execution pending the determinat
this case.

"The question for the Court is this—Was the coppe
a fixture, or part of a fixture, so as not to be the sub
larceny, by reason of the matters above referred to?

"If the Court shall be of opinion that it was, the con
is to be quashed; if otherwise, the conviction is to
good."

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loran for the accused—This plate savours of the
ıd therefore cannot be the subject of larceny at
aw: *Lee* v. *Risdon* (*a*); *Russell* (6th ed.), vol. ii., 222;
Pl. Cr., i., 148. As to the fact that this plate was
detached, that does not take away from its quality of
Without it the table was incomplete. It was only
for the purpose of being cleaned—that is, to effectuate
urpose.

ferred to *Sheffield, etc., Building Society* v. *Har-*
Smith v. *McClure* (*c*); *Fisher* v. *Dixon* (*d*); *Ex parte*
re Richards (*e*).

r for the Crown—The plate was useless if left always
It was part of its use that it should be taken off.
was taken off it became a chattel capable of being
Vhen the accused received it it was undoubtedly a

EN, C.J. Even if your last proposition is correct it
u no further if it were not a chattel when it was
then it had not been stolen, and so to receive it, even
vledge of its history, was no crime.]

case the evidence brings the case within the combined
ecs. 97 and 307 of the *Crimes Act* 1890.

EN, C.J. The case against the prisoner was not
at way at the trial. He was not so charged, and the
not asked to find him guilty under those sections. Nor
erved any question under those sections.]

erred to *Bl. Comm.*, iv., 232; *Inglis* v. *Robertson* (*f*);
Fixtures, pp. 76, 156.

Cur. adv. vult.

EN, C.J., read the following judgment:—In this case
question which is reserved for this Court is whether
what is undoubtedly a fixture can be the subject of
common law, by reason of the fact that it is intended
sometimes is, detached from its position as part of the

6] 7 Taunton 188.
4] 15 Q.B.D. 358.
4] 32 W.R. 459.
(*d*) [1846] 12 Cl. & Fin. 312.
(*e*) [1869] L.R. 4 Ch. 630.
(*f*) [1898] A.C. 616, at p. 630.

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fixture for the purpose of being freed from amalgam wh
the ordinary course of the use of the fixture, accumulates u

In my opinion, it cannot be the subject of such larceny

In the first place, it is well established that all thos
distinctions which prevail as to what are fixtures as be
landlord and tenant, and what are trade fixtures, and wha
are outside the question here. The present question is thi
the copper plate which the prisoner has been found to
received knowing it to have been stolen a fixture ?—becaus
was it could not have been stolen, because it was not capa
being the subject of larceny at common law, and therefore
not be feloniously received, because to be so it must have
previously stolen. The fixture of which the copper plate
part was owned by the owner of the soil, and therefor
questions which might arise as to the ownership of c
classes of fixtures between landlord and tenant, or as being
fixtures, cannot come in question here: *Fisher* v. *Dixo*
Climie v. *Wood* (*h*); *Longbottom* v. *Berry* (*i*); *Holland* v.
son (*k*).

Regarding the question as free from the above s
features, then all that belongs to the machinery fixed
freehold, although more or less capable of being detachec
it, and more or less capable of being used in such detached
must also be considered as belonging to the heir—*Fis*
Dixon (*supra*)—that is, as part of the fixture. And this
though the part was attached by nails which could eas
removed and without damage to the freehold: *Holla*
Hodgson (*l*); *Longbottom* v. *Berry* (*supra*); *Climie* v.
(*supra*).

And even where a part of a fixture is actually severed
it, that part may still be a fixture for the purpose of asce
ing the property in it—*e.g.*, a millstone, though actually se
from the mill to be picked or cleaned: *Shepherd's Touch*
90; *The Queen* v. *Wheeler* (*m*); *Ex parte Astbury* (*n*); *L*
Case (*o*).

(*g*) 12 Cl. & Fin. 312.
(*h*) [1869] L.R. 4 Exch. 328.
(*i*) [1869] L.R. 5 Q.B. 123.
(*k*) [1872] L.R. 7 C.P. 328.
(*l*) L.R. 7 C.P. 328.
(*m*) 6 Modern Rep. Cases 277.
(*n*) [1869] L.R. 4 Ch. 630.
(*o*) 11 Coke 46 (*b*), 50 (*b*).

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per plate, the subject of the presentment against the as therefore a fixture, so as not to be the subject of common law. It is to be regretted, so far as a regret anything which is according to law, that er should escape, because in the matter of moral his act is as reprehensible as if he were legally for it. But so long as any misdoing falls short of a efined by law, this Court should be as careful that accused shall not suffer for it as it would be to consequences of legal guilt.

h valuable property, however, now consists of fixtures vable, that a change in the law with regard to depre- respect of such things is certainly desirable. There certain statutory enactments; such as sec. 97 of the 1890, which aim in this direction, but they are so limited as not to be effectual to create the offence of such things as these copper plates, for example. quisite is a section such as that in the Queensland h will go to the root of the matter. The section provides that "Every inanimate thing whatever e property of any person and which is capable of movable is capable of being stolen. Every inanimate is the property of any person and which is capable ade movable is capable of being stolen as soon as it ovable although it is made movable in order to

viction of this prisoner must be quashed.

D, J. The question which the Court is asked to is whether a certain copper plate, forming an essential ppling table, was a fixture, or part of a fixture, so as e subject of larceny, meaning larceny at common law. ates distinctly that the rippling table was a fixture, es it. The description, however, shows that it was ched to the ground, so that there is no contradiction e statement and the facts on which it is based. The e could be easily detached from the table, but, being l part of it, could not, in my opinion, be the subject

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Holroyd, J.

of larceny at common law while affixed to it, unless the table was capable of being stolen. At common law n could be guilty of stealing anything which formed part soil, and according to the maxim, *quicquid plantatur soi cedit*, the rippling table, which was firmly planted in tl formed part of the soil, and could not be stolen. Possib rippling table, if constructed by a tenant on freehold land Crown land by an occupant of a battery site, might hav removable as a tenant's fixture by the tenant, or by the oc under the mining laws of the district where it was si The facts set forth disclose nothing upon this point. Bu could have been lawfully removed, whether by agre custom, or statute law, it still remained a fixture while in the soil. I think, therefore, that the question sho answered thus—that the copper plate was part of a fixtu not to be the subject of larceny at common law, and th that the conviction must be quashed.

A'BECKETT, J. The only doubt I felt in this case wa whether the old rule of law as to larceny would ap chattels which might be said to be only constructively fi which were not in fact part of the freehold, and co detached from it without injury; as to whether trade f lawfully removable by their owner, must be held to be the soil in favour of a person who abstracted them. My has, however, been removed by reference to *Webster's C* on an indictment for stealing parchment writings, wh Court held that, as these writings concerned the real prisoner could not be guilty of the felony charged in the ment. So long as we are bound by the old law, we must it with all its consequences, however apparently absu therefore I agree that the conviction before us must be qu

Conviction quas

Solicitor for the Crown: *Guinness*, Crown Solicitor.
Solicitor for the accused: *D. O'Halloran.*

(*p*) [1740] Leach, p. 14.

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v. WILLIAMSTOWN BATHING CO. LIMITED.

F.C.

1903
December 2, 7.

Charge for admission to a building—Undertaking of owner of building —Injury to person using—Degree of care—Misdirection.

ion for damages for injuries sustained by the plaintiff by reason of a flooring round defendant's swimming baths, for admission to which ı charged by the defendant, the jury were directed "that the as bound to take reasonable care to prevent accidents to persons aths; that reasonable care was the care which a reasonable man the circumstances to exercise; that if the defendant had exercised able care there was no negligence, and the defendant would be ıceeed."

) That this direction was sufficient. (*b*) That it was not necessary ry that the defendant had impliedly contracted and warranted that e was reasonably fit for the purpose for which it was to be used.

. *Cockrell* ([1870] L.R. 5 Q.B.) discussed.

L FROM THE COUNTY COURT.

aintiff, Charles Faux, sued the defendant the Williams- ning Co. Limited, in the County Court at Melbourne, e words of the plaint, "damages sustained by him rfully on the premises of the defendant at defendant's and for the purposes of business, in that one of the the flooring of the said premises was rotten and unfit ıd the plaintiff trod on the said board, which gave way ı, whereby plaintiff sustained severe injuries to his leg, e evidence for the plaintiff showed that the floor ine wood, and had been down for 15 years; that tiff paid for admission, and, having undressed, was long the platform to the water when his foot and leg the knee went through a board, and he was injured According to the plaintiff the board was rotten. The or the defendant was that the board was sound, and cause of its breaking away was the shifting to the ⅞ths of an inch of a joist on which it rested. That this brought about through a strain to which the platform subjected during heavy weather. That it was not e from above, and that there had shortly before been ion from beneath, which had not disclosed any defect ıcture.

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The learned Judge's direction to the jury is set out judgment of A'Beckett, J. The jury having found a for the defendant, judgment was entered according an application was then made for an order that that ju should be set aside, and a new trial had, on the gro (1) That the verdict was against the weight of ev (2) that the learned Judge misdirected the jury by di them, etc. (*ut infra*) . . . . and further, by not exp with more particularity the measure of care required defendant. This application was refused, and the present was against the order of the Judge of the County C refusing a new trial.

Arthur for the appellant—The direction of the learne was wrong. There is a higher degree of care demanded person, such as the defendant, provides a platform or s other thing for admission to which he charges a fee. Th special obligation cast on him by the nature of his contra undertakes that, so far as skill and care can make it structure is safe and fit for its purpose. The jury shoul fore have been directed that, though the defendant w liable for defects which no amount of skill and care discover, he was liable for any that the greatest care wou discovered. The facts of this case are exactly parallel t of *Francis* v. *Cockrell* (*a*). Apart from the question direction the evidence is all one way. The defect havi proved, it was for the defendant to show that he could n discovered it.

He referred also to *Hyman* v. *Nye* (*b*); *Readhead* *Midland Railway* (*c*); *Pollock on Torts* (5th ed.), pp. 47 *Leake on Contracts* (4th ed.), 262.

[HOOD, J., referred to *Marney* v. *Scott* (*d*).]

McArthur for the respondent—The argument for the p would make a person in the position of the defendant pra an insurer. All that is necessary, even according to the d

(*a*) L.R. 5 Q.B. 501.
(*b*) [1881] 6 Q.B.D. 685.
(*c*) [1869] L.R. 4 Q.B. 379.
(*d*) [1899] 1 Q.B. 986.

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at the defendant should have taken reasonable care
ructure was safe. In *Francis* v. *Cockrell* there had,
been negligence on the part of the contractor, and
e dicta in that case go beyond the decision, and are in
h other authorities.
ferred to *Indermaur* v. *Dames* (*e*); *Randall* v.
); *Burke* v. *Board of Land and Works* (*g*); *Gee* v.
an Railway Co. (*h*); *Richardson* v. *G.E. Railway*

in reply.

Cur. adv. vult.

ETT, J., delivered the judgment of the Court [A'BECKETT,
and HOOD, JJ.] In this case we have to deal with
from the learned Judge of the County Court refusing
l in a case tried by him with a jury. It was an action
the plaintiff suffered injury to his leg by a plank in
establishment being in an unsafe condition, and he
an action against the defendant company for the
which resulted from that injury. One defence was "no
e." There was also a denial that the board was rotten
for use. Evidence was given showing that the plain-
ut any fault of his own (there being no contributory
e on his part), had this accident, and that it was as a
o the condition of one of the planks in this construc-
en the defendant gave evidence as to the construction
hs, as to the character of the planks, and, what is more
to the case in the aspect in which it presents itself to
there had been an inspection of the platform from
d from below a short period before this accident
which had failed to discover that which led to the
ing way. It appeared that after heavy weather there
a strain, and that by reason of that strain something
the plank rested had been moved to the extent of
n inch, and that from that cause the accident occurred.
s nothing to show that the design or the construction

36] L.R. 1 C.P. 274.
37] 2 Q.B.D. 102.
83] 9 V.L.R. (L.) 356.
(*h*) [1873] L.R. 8 Q.B. 161.
(*i*) [1876] 1 C.P.D. 342.

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was faulty or that the plank was from its age or fr
material unfit for the purpose for which it was used.
other hand there was that evidence of inspection m
the defendant company. On these facts the learned
during his charge directed the jury "that the def
was not bound to make accidents impossible. The la
not so unreasonable as that—that what the law d
was that the defendant was bound to take reasonable
prevent accidents to persons, such as the plaintiff, usi
defendant's baths. That reasonable care was the care w
reasonable man ought, under the circumstances, to e
That if the defendant exercised such reasonable care the
no negligence, and the defendant would be entitled to su
and the learned Judge then proceeded to apply the
principles of law to the evidence given in this case, a
case adds—"The above is substantially all that the
Judge told the jury with reference to the degree of care t
defendant was bound to take."

Now, as to the only words which may be con
ambiguous—namely, "that reasonable care was the care
a man ought, under the circumstances, to exercise
have not the whole of the charge before us, but we
that the Judge evidently there referred to the fact th
defendant had taken money from the plaintiff for somet
be given in exchange, and that the defendant had unde
that proper precautions should be taken that the public
safely have that which they paid something to get.
argument for the plaintiff was—(1) That this directio
insufficient—that it was a misdirection; (2) that the
was against evidence. Both these objections depend up
degree and character of the responsibility which a pe
under occupying the position of the defendant—wheth
negligence for which he might be made liable should
different character to that denoted by the charge; wheth
degree of care and skill which had to be brought to bea
the construction to which the plaintiff trusted was suffi
expressed and suffiicently brought before the minds of t
in that charge—or, rather, what does the law say is the

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d skill which is requisite to absolve a person standing
osition of the defendant from responsibility for
As to that several authorities were cited, and that
the circumstances of the present case is the case of
for admission to a grandstand which broke down:
Cockrell (*k*).

are expressions in some of the judgments in that
cularly in the judgment of Chief Baron Kelly, which
n to require something higher in the shape of care
which was exercised here; and the expressions used
m to indicate that in order to absolve a defendant
consequences of the insecure condition of a structure,
vestigation however minute would fail to detect,
practically out of the question if this business was
ucted with any hope of benefit to the defendant. It
sible to continue such an establishment if the kind of
on, which it is contended should have been made to
e defendant, had to be made, that every plank should
every day, that there should be a daily investiga-
certain whether the condition of every part was
y sound.

argument for the plaintiff, though it has not been
that there is an absolute warranty of the safety
lding, still the only case of exception from liability
something in the nature of a concealed defect—
e, some insect whose ravages it would be impossible
from outside; something of that kind alone would
e defendant from liability. As I have said, there are
s in these judgments which would give substance to
ment as an argument, and we have not overlooked
ages or failed to give weight to the expressions used
se. The case itself was one in which it may be said to
ly obvious that the plaintiff was entitled to succeed.
defendant had employed a contractor to build a stand,
ch he had invited the public to come, and had charged
ce fee, and while plaintiff was there it collapsed, and the
vas whether the defendant having in his selection of a

(*k*) L.R. 5 Q.B. 501.

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contractor made a choice which was not negligent, whe
having been personally guilty of no negligence, sh
absolved from responsibility for an accident which
result of negligence on the part of the contractor.

The case itself does not seem to present the di
raised here. There the stand was manifestly insufficier
purpose. It came down, and the plaintiff was held en
recover for injuries caused thereby. But it is rathe
definition of the liability cast upon a person in the de
position than as being in its exact circumstances simila
case that it deserves attention. Chief Baron Kelly sa
503—"I am clearly of opinion, as a general proposition
that when one man engages with another to supply hir
particular article or thing to be applied to a certain
purpose in consideration of a pecuniary payment, he en
an implied contract that the article or thing shall be re
fit for the purpose for which it is to be used, and to whic
be applied. It is, indeed, subject to a qualification or e
to which I shall hereafter advert, as determined by *Rea
Midland Railway Co.* (*l*)." And again, at p. 508—"Fi
is the principle, which I hold to be well established b
authorities, that one who lets for hire or engages for th
of any article or thing, whether it be a carriage to be r
or a bridge to be passed over, or a stand from which t
steeplechase, or a place to be sat in by anybody v
witness to a spectacle, for a pecuniary considerati
warrant and does impliedly contract that the article
is reasonably fit for the purpose to which it is to be
The same Judge may be considered as rather modify
view by saying "the defendant did not contract aga
unseen and unknown defect which there was no mear
covering or ascertaining under ordinary (and this I thin
material) and reasonable modes of inquiry or examinati
other Judges who state their views put the defendant's li
terms which do not create the difficulty with which the
of the Chief Baron would seem to compel us to deal. K
says:—"I should prefer, however, to state the defendant'

(*l*) L.R. 4 Q.B. 379.

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or his undertaking to be that due care—that is, reasonable care—had been exercised in the erection of that stand which he so let out for the use of the public. It is found upon the case that reasonable care was not exercised, but that negligence occurred in its erection." Montague Smith, J., says:—"It seems to me that in cases of this kind which relate to things and not to personal services the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and that the proper mode of stating it is—the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so." The conclusion that there are expressions in these judgments which are capable of an interpretation overstating the degree of care which has to be exercised is strengthened by the reference made to these judgments in the case of *Searle* v. *Laverick* (*m*). At pages 127, 128, Blackburn, J., after citing the judgment of the Court below in *Francis* v. *Cockrell* (*n*) proceeds:—"It is said in the judgment in *Readhead* v. *Midland Railway Company* 'Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given. Applying this rule to the present case, we think that the contract of the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work as well as by himself.' This decision (says Blackburn, J.) was affirmed in the Exchequer Chamber. The judgments there were not written, and in some of them, as reported, expressions are used much more favourable to the extension of the doctrine of an implied warranty than the language used in the written judgment of the same Court in *Readhead* v. *Midland Railway Company*; but the two decisions are not in conflict, and both are binding on us."

(*m*) [1874] L.R. 9 Q.B. 122. (*n*) L.R. 5 Q.B. 184, at p. 193.

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We think that, having regard to the principles upo these cases have been decided, the matter must be jury to decide, and to say whether, having regard to the in which the defendant stood to the plaintiff, the defenc exercised reasonable care in the position in which he stoc plaintiff, and that the extent of the responsibility and wha absolve the defendant from liability was sufficiently e in the direction of the learned Judge. He was not boun to the jury "It will not do for you to say, gentlemen, precautions ordinarily taken were taken here. You w to find that the defendant would have been unable to this defect by anything he might do." As an indicatio view presented for the plaintiff one of the witnesses w whether he had reached up to examine the platform fro and said he could not do so, and it was then suggeste you climb up and examine each plank?"

We think that the learned Judge sufficiently d the kind of responsibility which defendant was unde would absolve him and what would make a ver the plaintiff the proper verdict, and that it was pu them in a manner which showed them what they consider. As to the evidence, we think that the evidence which warranted them in coming to the concl which they arrived. The question of whether the ver against the weight of evidence or not depends upon the of care which it was the duty of defendant to exercis jury found as a fact that there was no negligence. W that finding is not against the weight of evidence. We say that they might not have taken the other view, bu taken that view we see no reason to disturb their findin appeal will be dismissed, with costs.

Appeal dismissed, with

Solicitor for appellant: *J. G. Pitcher.*
Solicitor for respondent: *James Hall.*

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E. A. CLARK AND SON PROPRIETARY LIMITED *v.* THE MELBOURNE HARBOR TRUST COMMISSIONERS.

HOOD, J.

1903
October 14, 26.
November 16.

Corporation—Corporation created by Statute—Grant incompatible with objects of corporation—Works unnecessary for the primary purposes of corporation—Authority of statutory corporation to spend its funds—Trustees vested with land for public purposes—Dedication of highway—Melbourne Harbor Trust Act 1890 (*No.* 1119), *ss.* 4, 48, 54, 96, 107, 118—*Melbourne Harbor Trust Act* 1890, *No.* 2 (*No.* 1182), *s.* 8, *Eighth Schedule.*

A body created by Act of Parliament cannot grant to anyone any right incompatible with the main object which the Legislature had in view in creating it, and cannot impose upon its revenues the burden of maintaining, for the benefit of strangers, works not necessary for the primary purpose of the statutory creation, unless specially authorized.

Trustees in whom land is vested for public purposes may dedicate portions thereof to the use of the public as a highway only so far as such use be not inconsistent with the purposes for which the land is vested in them.

Rex v. *Leake* ([1833] 5 B. and Ad. 469) and *Great Western Railway Co.* v. *Solihull Rural Council* ([1902] 86 L.T. 852) followed.

See. A.G. v. London & S.W. R. Co. (1905) 21 T.L.R. 220.

Held, that, under the provisions of the *Melbourne Harbor Trust Act* 1890, the Trust had no power to dedicate to the public use a pontoon bridge across the entrance to a dock under its control and management.

MOTION.

The plaintiff was a proprietary company carrying on business at the Victorian Export Canning Works at Spottiswoode, in the city of Footscray. The claim of the plaintiff, as indorsed on the writ, issued on 13th June 1903, was for—(1) a declaration that the pontoon bridge at the mouth or entrance to the Victoria Dock is dedicated to the public as part of the highway or road between Melbourne and Footscray; (2) an injunction to restrain the defendants, its agents or servants, from removing or opening such pontoon bridge, except in so far as may be reasonably necessary for the purpose of allowing ships to enter into the said dock or depart out of the said dock; and (3) damages.

This was a motion, returnable on 30th June 1903, on behalf of the plaintiff for a mandatory order directing the defendants, their agents or servants, to replace or restore the said pontoon bridge, and for an order directing the defendants, their agents or servants, to refrain from removing or opening such pontoon bridge except in so far as might be reasonably necessary for the

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purpose of allowing ships to enter into or depart fr
dock.

From the affidavits in support of the motion it appear
the plaintiff was a large exporter to markets outside V
and to a large extent shipped its goods from the wha
the River Yarra; that the most direct way of transpo
goods both for export and for delivery in Melbourne wa
route which included the new Footscray road and the p
bridge in question, which had been used continuously
servants of the plaintiff and other business people of Fo
Yarraville, Spottiswoode, Newport, and Williamstown fo
seven years, except for short periods when the brid
removed for the purpose of allowing vessels to enter
depart from the dock, or was closed for repairs, when n
intention to so close was, on each occasion, advertised; t
defendants had removed the bridge permanently; and t
of the effects of such removal would be to render t
Footscray road practically useless to the plaintiff and
other business people and the residents of the places me
and that another would be to cause a much longer tim
spent in carrying the goods of the plaintiff and other
people similarly situated, which would entail additional
upon them.

The affidavits on behalf of the defendants stated th
was no intention at any time to dedicate the bridge
public; that the bridge and its abutments were 1
long, and the bridge itself was 100 feet long, so t
available width for vessels to pass into and out of the d
only 100 feet; that frequent complaints had been m
masters and pilots to the effect that the bridge was da
and a menace to shipping entering and leaving the
reason of the abutments extending outwards into the e
and thereby limiting the width of the entrance; that nu
accidents had occurred by reason of ships colliding w
abutments, causing damage to such ships and abutment
the bridge and abutments had been a source of great exp
the defendants in the maintenance and repair thereof; a
to erect a swing bridge at the point, as suggested

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plaintiff, would cost some 30,000*l.*, which the defendants were not in a position to expend.

By consent the motion was treated as though it were the trial of the action.

Cussen (with him *Schutt*) for the plaintiff—As to the power of a corporation to dedicate a highway where the use of the highway is not incompatible with the objects of the corporation, see *The Grand Junction Canal Company* v. *Petty* (*a*), following *Rex* v. *Leake* (*b*); *Great Western Railway Co.* v. *Solihull Rural Council* (*c*); *In re Gonty and The Manchester, Sheffield, and Lincolnshire Railway Co.* (*d*), and *The Grand Surrey Canal Company* v. *Hall* (*e*). The Commissioners have ample power under their Act, if the entrance is too narrow, to widen it, and they must do so, and cannot remove the bridge altogether.

He referred to *Melbourne Harbor Trust Act* 1890, secs. 42, 43, 46, 47, 54, 58, 59, 60, 63, 65, 84, 96, 99, 106–109, 144, and the Act No. 1182, sec. 8, and Tenth Schedule.

Isaacs, K.C. (with him *Starke*) for the defendants—There is nothing in the Act which put it in the power of the defendants to dedicate this land as a highway; and if it could have been dedicated at all its use now would be incompatible with the purposes of the Act. *Cf. Rex* v. *Leake* (*f*); *Ayr Harbor Trustees* v. *Oswald* (*g*); *Staffordshire and Worcestershire Canal* v. *Birmingham Canal Navigations* (*h*); *Thwaites* v. *Brahe* (*i*); *Mulliner* v. *Midland Railway Company* (*k*); *Neaverson* v. *Peterborough Rural Council* (*l*); and 7 *Co. Inst.* 700. The plaintiff has no right to bring this action, as he has sustained no damage, and has not proved any.

Cussen—As to the plaintiff's right to sue, see *The Westminster Brymbo Coal and Coke Company* v. *Clayton* (*m*). The

(*a*) [1888] 21 Q.B.D. 273.
(*b*) 5 B. & Ad. 469.
(*c*) 86 L.T. 852.
(*d*) [1896] 2 Q.B. 439, at p. 445.
(*e*) [1840] 1 M. & G. 392.
(*f*) 5 B. & Ad. 469, per Parke B., at p. 481.
(*g*) [1883] 8 App. Cas. 623.
(*h*) [1866] L.R. 1 H.L. 254.
(*i*) [1895] 21 V.L.R. 192.
(*k*) [1879] 11 Ch. D. 611.
(*l*) [1902] 1 Ch., 557.
(*m*) 36 L.J. (Ch.) 476.

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HOOD, J.

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defendants' regulations as to traffic across the bridge repealed, and the defendants must abide by them, as we rest of the community, until they are repealed.

[HOOD, J. If they repealed the regulations to-morro would be the use of the *mandamus* ?]

It is clear that any purpose which is inconsistent Act of Parliament is beyond their powers, but this dedi not only not inconsistent with the purposes of the Ac consistent with it, by necessary inference, if not by provision.

Cur. adv.

HOOD, J., read the following judgment:—The pl seeking to prevent the defendants from interfering pontoon bridge which has been used as a means of cros entrance to one of the docks, and which the defendants desirous of removing. By consent this motion is to b as though it were the trial of the action, and variou points have been waived in order to obtain a decisio real question in dispute.

I am satisfied that the defendants reasonably believe bridge, in its present state, is a source of danger to ships or leaving the dock. I also find that it would entail con expense on the defendants if they had to replace the structure by one free from objection. The plaintiff, contends that this bridge has been dedicated to the publ part of a road giving access to the wharves from Footsc therefore must not be removed, while the defendan dedication as a fact, and in addition, urge that there c in law, be any dedication. As to the latter point, there seem to be much doubt as to the principles which shou the Court. A body, created by Act of Parliament, cann to anyone any right incompatible with the main objec the Legislature had in view in creating it. Nor ca body impose upon its revenues a burden of maintaining benefit of strangers, works not necessary for the purpose of the statutory creation, unless specially au Trustees, such as the defendants, in whom land is ve

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public purposes, may dedicate portions thereof to the use of the public as a highway only so far as such use be not inconsistent with the purposes for which the land is vested in them: *Rex* v. *Leake* (*n*); *Great Western Railway Co.* v. *The Solihull Rural Council* (*o*). I have therefore to decide if the alleged dedication here is inconsistent with the object for which the land was given to the defendants, and the question is a mixed one of law and fact.

The determination mainly depends upon the construction of the Statute under which the defendants exist.

These Commissioners are, by sec. 4 of the *Melbourne Harbor Trust Act* 1890, a body corporate with power to hold lands and other property, subject to the restrictions in the Act. By secs. 46 and 47 certain lands are vested in the defendants. Sec 48 declares that the land in the Second Schedule (upon portion of which this dock is formed) shall be held by the defendants as sites for docks with all necessary works and approaches in connection therewith. The exclusive management and control of the port, with certain exceptions not now material, is vested in the Commissioners, together with the preservation and improvement of the port generally, by sec. 54. So that this land where this dock is situated is the property of the defendants, but only for a specified purpose, and it is their duty to improve it whenever in their opinion it needs improvement. Then, by sec. 118, a "Harbor Trust Fund" is created, and all moneys of the Commissioners (less one-fifth to the Government) goes into this fund, and "shall be applicable to and be applied by the Commissioners in carrying this Act into execution." Thus there is a clear restriction on the powers of the defendants, an emphatic declaration as to how the moneys of the Trust are to be expended, and there is no power of giving away any of the lands by dedication or otherwise, or of building any bridges, or of making any roads, except in so far as such works might be necessary adjuncts to docks. It is not alleged that this pontoon bridge is required for the purposes of the Trust, but reliance is placed upon sec. 96 as enabling defendants to dedicate roads. By that section the duty is imposed upon the

(*n*) 5 B. & Ad. 469. (*o*) 86 L.T. 852.

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defendants of making and maintaining proper roads and approaches to all wharves, docks, etc. It was conceded that the defendants would have a discretion in the first instance as to where such roads should be made, but it was urged that, having once exercised that discretion, the road became dedicated to the public, and must always thereafter be kept open. The result of such a construction would be that the Commissioners for the time being would, by making a road, bind themselves and their successors in perpetuity. If, therefore, the road, or any portion of it, became a menace to shipping, or interfered with the proper use of the docks, no change could be made in some instances at all, or in cases such as the present, without spending the Trust's money for the benefit of outsiders who might or might not be using the road as a means of access to the wharves. And, moreover, in this case the closing of the bridge would not prevent access to any wharf, but would only deprive certain persons of the shortest road to certain wharves, so that Trust money would be spent merely for the convenience of these particular persons. I cannot think that sec. 96 has the meaning contended for on behalf of the plaintiff. Full effect is given to every word of it, and the true meaning arrived at, in my opinion, by holding that it casts the obligation upon the defendants of providing proper approaches to their works, but that they may, from time to time, alter those approaches as may be necessary for the carrying out of their statutory duties. The roads are to be merely ancillary to the wharves and docks.

This view is supported by reference to some other sections. If the defendants can, of their own motion, dedicate a road simply by making it, there would be little necessity for sec. 107. It is there provided that the Governor in Council may, at the request of the Commissioners and of the council of a municipality, declare any land vested in the Commissioners to be a public highway. The assent of the Governor in Council would seem unnecessary if the plaintiff's contention here were correct, and the only effect of sec. 107 would be to vest the control of the road in the council of the municipality. Again, by sec. 60, the defendants can only lease superfluous lands for twenty-one years, and that requires the approval of the

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Governor in Council. So that they cannot lease without restriction land not required for the accommodation of the shipping of the port; yet, according to the plaintiff's view, they may give away, by dedication, land that may be so required. All this tells against any power to dedicate.

Difficulty is, however, raised by the eighth section and the Tenth Schedule of Act No. 1182. The Legislature there contemplated the construction of a tramway across the entrance to this dock, and power is given to the defendants in respect thereto. That fact, coupled with the evidence relating to the formation of the road from Dudley-street to Footscray, looks like a legislative intimation that this was a public highway. There is, however, no reference in this Act to this bridge. The tramway may or may not be made by the defendants. Even when made, it may be on any level. It may be above or on either side of this bridge, and there need be no provision for any traffic except the trams, and as this is a pontoon bridge it seems fairly clear that it was never meant that the tramway to be made under the *Tramways Act* should run across such a construction. I cannot, therefore, think that there is here any indication of an intention of Parliament to empower the Commissioners to dedicate the road, of which this bridge is a portion, so as to bind themselves for all time. The primary object of the Legislature was the creation and preservation of docks for the benefit of shipping, and the land must not be used for any purpose inconsistent with that object. Such a dedication as that contended for by the plaintiff would prevent the defendants from altering this bridge in any way, no matter how essential such alteration might be in the interest of the port. It might be necessary to widen the entrance, or to close it and open a new one, and this could not be done unless, as was argued, the defendants at their own expense erected new bridges, and kept the road open. The chief object of the Legislature, therefore, would be frustrated unless the defendants used their funds, not only in improving their docks, but also in keeping open roads, not as adjuncts to the docks, but for the benefit of the whole public, including those who would be merely passing through without any desire to obtain access to the wharves.

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HOOD, J.

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Such a dedication would be, in my opinion, incompat
the object for which the trust was created, and
ultra vires.

As to the other question, I need only say that the
reason for thinking that, as a fact, this bridge w
dedicated as part of a road or approach to any wharf
used as a portion of a scheme for affording a shorter
Footscray to Melbourne. The plaintiff also admi
writ that the bridge may be removed so far as is r
necessary to allow ships to enter and leave the doc
appears to recognize what I am inclined to think is
version, that the only dedication was one subject to th
of the shipping, and that, when that interest so req
bridge may be removed, either temporarily or per
But I need not decide this point, because, in my op
defendants had no power to dedicate this bridge to t
so as to deprive themselves of the right to alter or
and therefore the plaintiffs must fail. This motion
dismissed with costs, and judgment entered for the de
with costs.

Judgment for the defe

Solicitors for the plaintiff: *Gillott, Bates & Moir.*
Solicitors for the defendants: *Malleson, England &*

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MARTELL *v.* VICTORIAN COAL MINERS' ASSOCIATION *and Others.*

A'BECKETT, J.

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April 21, 22, 23, *May* 20, 21.

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September 2, 4, 7, 8, 9, 10.

Action, cause of—Interference with legal right—Intent to injure—Lawful excuse—Combination to further own interests—Trades union—Combination doing illegal act or using illegal means to effect its purpose—Illegal conspiracy—Interference with employment—Coercion of employer—Threat of illegal strike—Strike of workmen—Procuring breach of contract—Damage.

Per the Full Court (MADDEN, C.J., HODGES and HOOD, JJ.) Where a combination (or, *per* MADDEN, C.J., an individual) does any act with intent to harm another, without lawful excuse, and harm, in fact, results to him, an action lies for damages by the person injured: *Quinn* v. *Leathem* ([1901] A.C. 495).

Where, however, unlawful means are adopted to effect the purpose of such combination, there can be no lawful excuse.

A combination of persons, with intent to coerce their employer, by means of a threat, into dismissing from his employment or refusing to employ another person, is actionable at the suit of that person, where the threat used is that of an unlawful strike.

Semble, per MADDEN, C.J., and HOOD, J., that such a combination can in no case be lawful.

Per MADDEN, C.J. Where the dominant purpose and intention of a combination of persons is to harm another, and harm in fact results to him, it is no lawful excuse that they are pursuing their own business, or advancing their own interests, as, *e.g.*, that they are endeavouring to uphold the principles of trades unionism, and are punishing the person so harmed for a violation of such principles.

Where, however, the dominant purpose and intention of a combination of persons, in doing an act, is an honest desire to advance or protect their own interests, that affords a lawful excuse, even though they know the doing of such act will necessarily harm another or others.

Per HODGES, J. A combination of persons to do an illegal thing, or to effect, by unlawful means, something which in itself may be indifferent or even lawful, is a criminal conspiracy: *O'Connell's Case* ([1844] 11 Cl. & F. 155); and where harm results an action lies against them by the person injured: *Quinn* v. *Leathem*. A person who procures the act of another is legally responsible for its consequences, even though the act induced is within the right of the immediate actor, if it be to the detriment of a third person, and if he can be shown to have procured his object by the use of illegal means directed against that third party: *Lumley* v. *Gye* ([1853] 2 E. & B. 216).

Mogul Steamship Co. v. *McGregor, Gow and Co.* ([1889] 23 Q.B.D. 594), [1892] A.C. 25), *Temperton* v. *Russell* ([1893] 1 Q.B. 715), *Allen* v. *Flood* ([1898] A.C. 1), and *Quinn* v. *Leathem* ([1901] A.C. 495) discussed.

APPEAL.

The plaintiff was John Martell, and the defendants, as specified in the writ of summons, were "The Victorian Coal Miners' Association, George Gregory and Andrew Gray, president

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and secretary respectively of the Outtrim lodge or branch of the said association, both personally and on behalf of the members of such lodge or branch, David McEwan, Arthur A. Wilson, and James Kirby;" but from the heading to the statement of claim the words "both personally and on behalf of the members of such lodge or branch" were omitted; and no defence was delivered on behalf of such lodge or branch. The plaintiff was a miner, and for about four weeks prior to the 7th July 1902 was employed as such by the Outtrim Howitt and British Consolidated Coal Company No Liability. The defendant association was a trades union registered under the *Trades Union Act* 1890, of which the defendant McEwan, who was a coal-miner, and the defendant Wilson, who was a check-weigher, were respectively the president and general secretary; and the defendants Gregory, Gray, and Kirby were also coal-miners. The facts material to this report are fully recited by Madden, C.J., in his judgment (*infra*); and the allegations in the statement of claim put in issue by the defences are set out in the judgment of A'Beckett, J. (*infra*).

The plaintiff claimed 1000*l.* damages, and also an injunction restraining the defendants from interfering with the plaintiff in his employment, and from attempting to deprive plaintiff of his employment or chances of employment.

The action was heard by A'Beckett, J., who entered judgment for the defendants.

The plaintiff appealed from this judgment.

Cussen, *Eagleson*, and *Jacobs* for the plaintiff.

Duffy, *K.C.*, and *Gaunt* for the defendant the Victorian Coal Miners' Association.

Higgins for the other defendants.

It has been considered sufficient to set out only the arguments on the appeal.

A'BECKETT, J. I have to deal with much evidence in this case, which has lasted at intervals for a considerable period. I

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have also to deal with a question of law, as to which I have had the advantage of reading the judgments delivered in the cases which have been commented upon by counsel. As to the essential questions of fact, I think they are capable of being reduced into a very small compass, and I see no advantage in reserving my judgment so far as it deals with questions of fact; and on the question of law, I see no advantage in reviewing the opinions advanced by the eminent Judges who have given such very opposite views as the result of their conclusions on the question. On the question of law, I merely propose to state the view of the law as I gather it from the decisions, without examining and contrasting the different views which have been held by the learned Judges who have given those decisions; because, unless I were to proceed to do this most exhaustively, there could be no advantage in doing it at all. I can only say what I take to be the law as gathered from those decisions and as explained by the Judges who have given them.

Upon the question of fact, I think that it comes to this, as I stated in an earlier part of the case : The members of one of the lodges or branches of the defendant association—the lodge or branch at Outtrim—determined that they would not work with three men who had broken the rules of another association—a gold-miners' association ; and they determined to get these men out of the mine by informing the mine manager that they would not work with them. They do inform him, and he does not remove them, and, as a consequence, they strike. As a consequence of the strike there is no employment for the men objected to, and the plaintiff leaves the district. When he has left the district the men go back to the mine. The plaintiff then seeks re-employment. He does not get it, because the employer knows that mischief, similar to what occurred before, will occur again if it re-employs him. The question is—Has this plaintiff a right of action? Was this intimation given to the employer intended to induce the employer not to continue employing the plaintiff; and does that give him a cause of action when he loses his employment in consequence of it, and he cannot be re-employed in consequence of it?

The case as it is put by the statement of claim is not one of

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a breach of contract for employment made by the plaintiff with the company which employed him, but it is put in this way: Paragraph 3 states that between certain dates "the defendants and each and every of them with the object and intention of injuring the plaintiff and depriving him of employment with the Outtrim Howitt and British Consolidated Coal Company No Liability and his chances of employment as a miner with such company or otherwise wrongfully and maliciously by wrongful and malicious threats acts and conduct induced procured and coerced the said company in whose employment the plaintiff then was as a coal-miner to cease to employ the plaintiff as a coal-miner on its mine and to dismiss him from its employment." The 4th paragraph runs in the same way—that they with the same object and intention "wrongfully and maliciously conspired and agreed together to wrongfully and maliciously induce" the same thing; and then the 5th paragraph says that "in pursuance of such aforesaid conspiracy and agreement the defendants maliciously and wrongfully by unlawful threats acts and conduct induced procured and coerced the said company to cease to employ the plaintiff as a coal miner on its mine and to dismiss him from its employment." The 6th paragraph says that "by reason of the above facts the plaintiff has lost his employment and his chances of employment either with the said company or otherwise." So that there is no claim based upon the breaking of a contract with him by the company, and if there had been such a case made on the pleadings I do not think it would have been supported by the evidence; and as affecting the legal position I think it is material to bear that in mind. It all comes to this—Is it an illegal thing to say "We will not work with this man, we will go out if you employ him." And where, as a consequence of this, the man loses his employment, has he a right of action?

The history of the case is that the plaintiff had been a member of the Chiltern branch of another association—the Amalgamated Miners' Association. There was a strike amongst its members working at a particular mine at Eldorado, and the plaintiff appears to have advocated a compromise with their employer, and to have considered—and very likely reasonably

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considered—that the men were acting against their own interests and in a foolish manner in refusing to take what the directors of that mine were willing to give; and as evidence of his taking a reasonable view, there is the fact that the mine was at the time of the strike shut down, and has never been opened since. He also considered that the strike funds had been misappropriated. He was in correspondence with a newspaper in Melbourne, and he had visited the directors of the mine in Melbourne when on a visit there. He was distrusted, and suspected —very likely unjustly—of acting adversely to their interests, and was decidedly unpopular; but that which caused his final separation from the men was this—he received strike pay for a considerable period, and he proposed some resolution in which he was on one side and the rest of the men on the other. He said that he felt it was hopeless to remain out any longer, and that he would go back, and he did so, and worked for the employer, and that, from a unionist point of view, was a crime of the first magnitude. The plaintiff then leaves that district and goes to Outtrim, and by some means the miners with whom he is working there hear of what had occurred at Eldorado. He becomes aware of this, and wishes to put himself right with them, and to join their union. They object, and he comes before a meeting of the committe of the lodge there, and states his case, giving his account of what took place at Eldorado. This is taken down in writing, and the committee take steps to see whether his statement is true; and they do not seem to have discovered anything which was decidedly untrue in what he has stated to them. They found that he was very unpopular there, that he was not trusted there, and they also found this fact—that he left the union there. Upon this they decided they would not receive him into their union, and his being received in the union was necessary, from their point of view, in order for him to continue working there. It is unnecessary for me to say whether they gave him all the facilities for explanation which he might have expected. I cannot say that they acted altogether unreasonably in the matter. One fact which was undisputed was sufficient for them to refuse to admit him into their union. But I do not think it material that I should decide

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whether they acted reasonably or unreasonably in refusing to admit him into their union. A great deal of evidence has been directed to that. At any rate, they declined to admit him. They had promised to give him information of their deliberations on that matter, but they did not do so. They certainly did not treat him or behave towards him as they should in that matter. They had promised to give him the information, and they did not give it, but they left him to find it out for himself—by the treasurer refusing to receive his money. That having taken place, they informed the mine manager that they would not work with these three men. It is material, as affecting my consideration of what they did in this case, in determining whether they were actuated by malice against him as the dominant motive, that he with others was objected to by the men. What I have to consider is, certainly not what happened afterwards, or whether, in certain incidents which occurred before, they showed ill-will towards him, or spoke in terms of hostility towards him, but whether, in what they did as the subject-matter of this action, their dominant motive was to injure him—to inflict upon him, by reason of the animosity which they entertained against him, some personal loss, some injury. The injury, such as it was, was common both to him and to the others, as to whom, so far as is to be gathered from the evidence, they entertained no special hostility. The others stood just in the same position. Their cause of complaint against the three men was that they had broken the union rules. They were not in their union, but were marked men in another association, and they thought that they should not work with them. Then they went to the mine manager and distinctly told him that if these men were continued to be employed they would go out. There is no question as to that—not the slightest doubt as to that. Then, at a subsequent meeting, there is some dispute between a director of the company and the secretary and one of those who were attending on behalf of the miners as to what had transpired at the last preceding meeting. Some words ensue, which bring the meeting to an angry termination, and the men go out on strike. There is then nothing for Martell to do, and

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he goes away. Then work is resumed, and he seeks employment, and he does not get it, and I have already stated the reason why he does not get it. There is no difficulty whatever on the facts as to that—that the plaintiff is perfectly justified in his assertion as to the cause of his losing employment with the company being that which he states in the statement of claim, and that he did sustain damage of the kind set out in the statement of claim, and would be entitled to substantial damages if an actionable wrong had been committed by these defendants.

The first-named defendant is an association, which is registered under the *Trades Union Act*, and the first question I have to consider is, whether, whatever the law might be as to the other defendants, there was a case made out against the Victorian Coal Miners' Association. I have already, during the course of the case, stated my impression that there was no evidence which would prove as against them their connection as an association with these matters which are complained of. I am still of that opinion. There were certain things which reasonably gave rise to suspicion that they were acting, but as I stated before, I think that on the broad facts the conclusion would be that they were not. Their rules provided certain proceedings which must precede a strike. A branch could not strike in such a way as to make the association answerable for its action, or give it a right to any of the funds of the association, unless a certain course was pursued. That course was not pursued, and the strikers got no assistance from the funds of the association. Of course there can be no doubt of the association sympathizing with the men, and being glad to assist them. Some letters were referred to which the secretary of the association signed in the name of the association—at least he signed himself as secretary of the association—but I do not think he can be regarded as an official authorized to write those letters, or as writing as secretary of the association. The facts look suspicious, but I think the facts fall far short of evidence upon which a jury, or I, myself, could act in saying that that was the work of the association, and that the association was liable. So that my findings of fact as to what the defendants did relate to the individual defendants, and not the association.

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Then we come to the question of law, which has been most thoroughly argued, and the authorities as to which have been examined at great length. I have read the judgments, which are of great length, in the cases of *Allen* v. *Flood* (*a*) and *Quinn* v. *Leathem* (*b*), which are those which are closest to the present case, and I think the circumstances of *Quinn* v. *Leathem* put that case altogether out of consideration as an authority in the present case. I think there can be no doubt of the illegality of the acts committed in *Quinn* v. *Leathem*, as to which the Judges were unanimous. But, before dealing with what the Judges decided in that case, I may refer to what Mr. Cussen read from *Chalmers-Hunt on the Law Relating to Trades Unions*, at pp. 93, 94—giving what he considers may fairly be stated as the present position of the law. This was written after *Quinn* v. *Leathem*, and considers all the cases on the question. He says:—"The principles which seem to underlie all these cases may be stated as follows:—(1) A combination to injure another in his trade or calling is *primâ facie* unlawful. (2) The *bonâ fide* intention to further the trading or labouring interests of the persons combining is a just cause or excuse, provided (*a*) the means resorted to be not in themselves unlawful, *e.g.*, violence, libel, unlawful threat, in which case the cause of action is not the conspiracy, but the tort itself committed in pursance of a common design; (*b*) the damage inflicted by the combination be reasonably referable to the alleged object of lawful gain or advantage; (*c*) the presumption raised by the facts of such *bonâ fide* intention be not excluded by other evidence of an intention to injure the person combined against from motives of animosity, hatred, and ill-will." So that those presumptions which may be raised in favour of the defendants may be excluded if the Court is satisfied that a malicious motive on the part of the defendants is the real incentive to their acts; and I think that in *Quinn* v. *Leathem* (*b*) there is a most distinct recognition of a malicious motive as being that which led to the acts being committed. At pp. 511, 512, Lord Macnaghten says:—"So far as I can see there was no trade dispute at all. Leathem had no difference

(*a*) [1898] A.C. 1. (*b*) [1901] A.C. 495.

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with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union." In several of the judgments there are passages equally strong, showing the vindictive character of the proceedings; and what was done in that case was altogether different in its kind from what was done here. There was an interference with the plaintiff by inciting others to do him positive injury; and in this same case of *Quinn* v. *Leathem* (*c*) Lord Shand says, in contrasting what occurred there with what had occurred in the case of *Allen* v. *Flood* (*d*) —"It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen* v. *Flood*, as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendants' argument."

I think that the character of the case, and the observations of the Judges who decided it, prevent me from taking *Quinn* v. *Leathem* (*e*) as my guide in saying how I should consider, as to legality or illegality, the acts upon which the present action is based. Mr. Cussen has observed upon the view taken by Lord Shand as differing and distinguishable from the views taken by the other Judges, and suggested that he had a view of his own not consistent with those of the other Judges concerned in *Allen*

(*c*) [1902] A.C. 495, at p. 515. (*d*) [1898] A.C. 1.
(*e*) [1902] A.C. 495.

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v. *Flood* (*f*) and *Quinn* v. *Leathem* (*g*); and it may be that his view is more favourable to the defendants here than those of the other learned Lords who expressed their views; but it certainly deserves consideration. It could not be suggested that his opinion was not to be considered in measuring the extent to which those cases went, and I do not find that it was so at variance with the other opinions expressed that I should fail to pay respect to it. I say that, because I am now going to refer again to Lord Shand—to what he says in the other case of *Allen* v. *Flood* (*f*). What I say about *Allen* v. *Flood* is that, if you treat it as some of the Lords treated it, merely on the assumption that the true facts were that the appellant just dropped in and made some observations as to what would be likely to happen, and that, therefore, no action could be brought against him, it is no authority whatever. It does not decide anything at all, except that a man cannot have an action brought against him if he makes a statement as to something injurious which might occur, if afterwards it does happen to occur. He would be merely imparting news as to something which subsequently occurs; and, of course, there can be no action as to that. The judgment to which I referred in *Allen* v. *Flood* (*f*) certainly goes far beyond anything of that kind. I was referring to what Lord Shand says at p. 165. He speaks about the threats of Allen. "What were these threats?" he says. "Simply this—that if the plaintiffs were continued in the employment, they, the boilermakers, would leave. Threats may, like false or fraudulent representations, be of such a nature, if used, as to amount to improper and unlawful means used to induce action which may be injurious to others, causing them loss and damage, and I should not for a moment say that damages might not in cases of such threats be recoverable. But this can only apply to threats of violence, intimidation, obstruction, or the like—threats which may be described as menace which improperly affects freedom of action in the person who is induced to act or to refrain from acting. The boilermakers were quite entitled to resolve that they would not then or at any future time work at the same vessel, or even in the same yard, with the plaintiffs.

(*f*) [1898] A.C. 1. (*g*) [1902] A.C. 495.

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No one can dispute their right so to resolve. They were quite entitled, having formed that resolution, to inform their employers that they had done so; indeed, I should say that the defendant Allen was only doing what was right and proper in intimating this resolution to the employers, in place of allowing the men to leave without notice to the employers of what would certainly cause them great inconvenience and loss. There was no threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act—*no threat to do anything beyond the exercise of their legal right.*" And Lord Herschell, at pp. 131, 132, says:—"The object which the appellant and the iron workers had in view was that they should be freed from the presence of men with whom they disliked working, or to prevent what they termed an unfair interference with their rights by men who did not belong to their craft doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the ironworkers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being entrusted to other hands. . . . In the present case it was admitted that the defendant had no personal spite against the plaintiffs. His object was, at the utmost, to prevent them in the future from doing work which he thought was not within their province, but within that of the ironworkers. If he had acted in exactly the same manner as he did at a time when the plaintiffs were engaged upon ironwork, his motive would have been precisely the same as it was in the present case, and the result to the plaintiffs would have been in no wise different. I am unable to see, then, that there is any difference either in point of ethics or law between the two cases. The ironworkers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that this was the case. The object which the defendant, and those whom he represented, had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end. The act which caused the damage to the

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plaintiffs was that of the iron company in refusing t
them. The company would not subordinate their owr
to the plaintiffs'. It is conceded that they could take t
with impunity. Why, then, should the defendant
because he did not subordinate the interests of
represented to the plaintiffs'? Self-interest dictated
act of those who caused the damage and the act which
to have induced them to cause it."

From the judgments in this case of *Allen* v. *Fl*
think that the mere intimation to an employer that a
tion of workmen will not work if a certain person
men are retained in their employment, they giving th
tion not to gratify malice felt with reference to those
whom they refuse to work, not prompted by a desire
those persons, but with the desire to strengthen their
bination by excluding from employment with them pe
are not, as they suppose, fit to be associated with then
union, is not an illegal act, and I think that nothing
that has been done in this case. I find against the ex
that personal malice, which, it is said, may forfeit the
within the meaning of this passage I have read. I do
that that existed in this case, and I therefore thin
actionable wrong was done by these individual defend
certainly did, as a mattter of fact, bring about the l
plaintiffs' employment when he was employed, and
cause of the company refusing to re-employ him. I t
the right asserted does not exist on the English author
tioned, to which I should add the case to which I wa
by Mr. Duffy, namely—*Bulcock* v. *St. Anne's Master*
Federation (*i*). There are some points of distinctio
case which Mr. Cussen has observed upon, but there is
about it that there the plaintiff who brought his actio
employment by reason of the intervention of the perso
whom the action was brought. I do not say that ther
grounds upon which distinctions may be drawn, but it
certainly tending in the same direction as the other a
to which I have referred.

(*h*) [1898] A.C. 1. (*i*) [1902] 19 *Times* L.R

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Then, as to the costs, I think that the defendants are entitled to their costs. There are some matters to which Mr. Cussen has referred, as to measures which he considers were taken (in reference to the production of documents) to take a document out of the proper custody of one defendant and place it in the custody of another, so that no imputation—no responsibility—might rest upon the defendant from whose book it was taken; and he also made certain observations as to the affidavit of documents. I do not think those matters should affect the general costs of the action, and in the particular instances I do not think they would afford sufficient ground for excepting any part of the costs to which they would otherwise be entitled. Some of the matters formed the subject of cross-examination in the course of the case. The explanation as to some of them was satisfactory. Some others of them may be susceptible of explanation. I do not think that matters of such little importance—they were certainly of a comparatively trivial kind—should be fastened upon, and that defendants should be penalized with costs because as to these matters there may have been some lapse from strict regularity. I do not think that there are sufficient grounds for depriving the defendants of costs, and there will therefore be judgment for the defendants with costs.

Judgment for the defendants, with costs.

From this decision the plaintiff appealed, the respondents to the appeal being the individual defendants and the defendant the Outtrim lodge or branch of the Victorian Coal Miners' Association.

Cussen (with him *Eagleson* and *Jacobs*) for the plaintiff appellant—Several tests for the determination of the liability of defendants in cases of this kind have been suggested. The test of personal spite or ill-will, laid down by Lord Esher, M.R., in the *Mogul Steamship Company* v. *Macgregor, Gow & Co.* (*k*) is wiped out by the case of *Allen* v. *Flood* (*l*). A further test is that which fixes on the intrinsic legality of the acts done. As

(*k*) 23 Q.B.D. 598. (*l*) [1898] A.C. 1.

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to that, the majority in *Allen* v. *Flood* excepted th
conspiracy. A third test, which is not inconsistent wi
last mentioned, finds the necessary element of illegal
conspiracy to harm, which, if followed by damage, is a
See, *e.g.*, the judgment of *Lord Macnaghten* in
Leathem (*m*). Again, Lord Lindley in *Quinn* v. *Le*
takes the stage when the act is done, and says:—
an act or threat of an act which will cause serious
or damage? If it is, it is coercion, and is *primâ faci*
Lords Halsbury, L.C., and Brampton in their j
in *Quinn* v. *Leathem* (*o*) rely upon conspiracy and
Bowen, L.J., in the *Mogul Case* (*p*) lays down the la
effect that any intentional damage inflicted on an inc
actionable if done without just cause or excuse.
further, that damage in trade is excused if done in the
course of trade competition. There must, however,
equivalent to the injury inflicted. Lord Shand adop
this view of Bowen, L.J., but in *Allen* v. *Flood* (*q*) he s
was not an intention to injure, while in *Quinn* v. *Le*
he says there was. In the *Mogul Case*, Bowen, L.J., s
614:—"What, then, are the limitations which the lav
on a trader in the conduct of his business as betwee
and other traders? . . . . Intimidation, obstruc
molestation are forbidden; so is the intentional procu
a violation of individual rights, contractual or other,
always that there is no just cause for it." As an illus
what is meant by this, suppose that X. had sold an ar
to A. and then to B., and A. induces X. to break his
with B., A. would have a "just cause" for so doing.
you are conducting a matter primarily for the benefit o
union, and it happens that injury is done to an indivi
are not liable; but if you are actively and directly i
man, although you do not desire to injure him person
no answer to say that indirectly it will benefit the unic
Watson says, in *Allen* v. *Flood* (*r*), that there are two

(*m*) [1901] A.C. 495, at pp. 510, 511.
(*n*) [1901] A.C. 495, at p. 538 *et seq.*
(*o*) [1901] A.C. 495.
(*p*) 23 Q.B.D. 598, at p.
(*q*) [1898] A.C. 1.
(*r*) [1898] A.C. 1, at p. 9

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upon which a person who procures the act of another can be made legally responsible for its consequences—(1) if he knowingly and for his own ends induces that other person to commit an actionable wrong; and (2) if he induces that other to do a lawful act, but uses unlawful means to bring it about. It is clear that all agreements to do a criminal act are conspiracies, while the cases show that agreements to commit a civil wrong are also conspiracies. *Inter alia*, the Courts have determined—probably from motives of public policy—that agreements to hamper in trade are illegal. *Cf.* the *Mogul Case* (*s*). In *Quinn* v. *Leathem* (*t*) Lord Macnaghten says, at pp. 510, 511:—"Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory* v. *Duke of Brunswick* (*u*) is one authority, and there are others. . . . That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by an individual cannot be doubted." In *Temperton* v. *Russell* (*v*) Lopes, L.J., says:—"The result of the authorities appears to me to be that a combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong if damage results to him therefrom." That shortly states the law as also laid down in the same case by Lord Esher, and, as he points out, although the defendants bore the plaintiff no personal ill-will at all, except so far as that ill-will arose from a desire to forward the principles of their union, still their act was actionable. *Temperton* v. *Russell* (*w*) is approved of in *Quinn* v. *Leathem* (*x*), and completely covers this case. Shortly put, the unlawfulness resides in the conspiracy. In this case therefore, even if all other considerations be put aside, the necessary element of illegality is supplied in the combination to injure. *Allen* v. *Flood* (*y*) is not at variance with *Quinn* v. *Leathem*; if it is, it

(*s*) 23 Q.B.D. 598, per Bowen, L.J., at p. 616 *et seq.*
(*t*) [1901] A.C. 495.
(*u*) [1844] 6 M. & G. 205, 953.
(*v*) [1893] 1 Q.B. 715, at p. 731.
(*w*) [1893] 1 Q.B. 715.
(*x*) [1901] A.C. 495.
(*y*) [1898] A.C. 1.

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is overruled by the latter case. The judgme
vary merely because of the varying views of the Ju
the facts, particularly as to whether what Allen said
to a threat or a mere intimation. The majority took
—the more lenient—view, and hence the decisio
appellant. It is pointed out at p. 3 of the report tha
J., "ruled that there was no evidence of conspir
intimidation, or of coercion, or of breach of contract."
must include, in the circumstances, threatened breach
That case, therefore, has no application to the facts o
The conclusions to be drawn from all the cases are—
bination to injure another person in his calling, carrie
direct act of interference, is actionable, if done withou
or excuse; that it is not a just cause or excuse that
will benefit in a remote and indirect manner those w
about; that the strengthening or upholding of e
political principles is not a just cause or excuse; and
must be a gain equivalent to the injury inflicted. F
threat of the defendants in this case was illegal, be
endeavoured to induce the company to break its con
the plaintiff, and threatened that otherwise they w
their own contract with the company—that they w
immediately, or at any rate at the expiration of s
whereas one of the conditions of their employmen
company was that there should be fourteen days'
either side. On the facts proved in this case we rely
propositions—(1) breach of contract and threatened
contract; (2) the conspiracy view; (3) the coercion
motive here was dislike, and the intention was to d
plaintiff of his employment.

Counsel both for the plaintiff and defendant deal
ively with the following cases in addition to tho
referred to:—*Lumley* v. *Gye* (*z*); *Lyons* v. *Wi*
Glamorgan Coal Company v. *South Wales Miner*
tion (*b*); *Bulcock* v. *St. Anne's Master Builders' Fede*

(*z*) 2 E. & B. 216.
(*a*) [1896] 1 Ch. 811.
(*b*) [1903] 1 K.B. 118; s
in [1903] 2 K.B.
(*c*) 19 *Times* L.R. 27.

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Read v. *Friendly Society of Operative Stonemasons* (*d*); and *Giblan* v. *The National Amalgamated Labourers' Union of Great Britain and Ireland* (*e*).

Counsel for the plaintiff also referred to:—*White* v. *Morris, Little and Son Limited* (*f*); *Ratcliffe* v. *Evans* (*g*); *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants* (*h*); and *Howden* v. *Yorkshire Miners' Association* (*i*).

Duffy, K.C., and *Higgins, K.C.* (with them *Gaunt*) for the defendants, respondents—A man has no right to employment beyond the particular term of his then employment; and every man has the right at common law to say how, when, where, and with whom he will work. He may go to his employer and say —"I will not work with you unless you dismiss 'so-and-so,'" and what one man may do in that case, a number of men may also legitimately do. So long as you keep within your own province or area, you may exercise your own exertions as you choose in your trade, in your employment, or in employing others, but as soon as you go outside such province or area your action becomes injurious to the public interests, and the Court will inquire whether it produces such an effect on the fortunes of the plaintiff as to be an interference with his legal rights. From the judgment of Erle, C.J., in *The Queen* v. *Rowlands* (*k*) down to that of Lord Lindley in *Quinn* v. *Leathem* (*l*) that has always been the law. See also *Roscoe's Criminal Law* (8th ed.), p. 409.

[*Cussen* referred to *Erle on Trade Unions*, p. 25, where the decision in *The Queen* v. *Rowlands* is commented on.]

You are not to look at the motive at all, but at the scope within which the man acts. In the case of the *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (*m*), which is referred to by Lord Lindley in *Quinn* v. *Leathem* (*n*), it was

(*d*) [1902] 2 K.B. 732.
(*e*) [1902] 18 *Times* L.R. 500; [1903] 19 T.L.R. 708; since reported in [1903] 2 K.B. 600.
(*f*) [1897] 23 V.L.R. 152.
(*g*) [1892] 2 Q.B. 504.
(*h*) [1901] A.C. 426.
(*i*) [1903] 1 K.B. 309.
(*k*) [1851] 17 Q.B. 671, 686 (*n.*)
(*l*) [1901] A.C. 495.
(*m*) [1898] 35 Sc. L.R. 645.
(*n*) [1901] A.C. 495, at p. 539.

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held that there was no cause of action; and the only
between that case and *Temperton* v. *Russell* (*o*) or
Leathem (*p*) is that in the two latter cases the defen
and induced others to do that which the law calls a w

[MADDEN, C.J. It is clear from Lord Lindley's
that that case was one of legitimate trade competition

In *Quinn* v. *Leathem* (*q*), Lord Lindley lay
that it is not coercion to use your own right to
whom you choose; and at p. 533 he says:—"An ac
lawful, although harmful, does not become actionabl
done maliciously in the sense of proceeding from a b
and with intent to annoy or harm another." That st
the law is the admitted essence of *Flood* v. *Allen* (*r*),
no means laid down for the first time in that cas
Lindley points out.

[MADDEN, C.J. If I go to my butcher and sa
withdraw my custom from you unless you dismiss
employment A., who some time ago offended me,"
surely be actionable?]

No; because according to the decision in *Allen*
the motive would make no difference, and you wo
perfect right to change your butcher.

[MADDEN, C.J. My intention would be to get A.
employment; my motive would be, because he had of

If an act is lawful, then clearly no action can li
unlawful, you have then to see whether it was done
to injure. Motive is nothing; intent even is not
real question is—"Has a legal wrong been commi
would be quite legitimate to go to an *employé* ar
will give you 5*l.* to leave your employer and
me." A'Beckett, J., has found that the defendant
reasonable from their point of view, and was for
benefit, and not for the purpose of injuring th
The very existence of their union prevented the
having the plaintiff in it, and impelled the steps
The position is no different to what it would have b

(*o*) [1893] 1 Q.B. 715.
(*p*) [1901] A.C. 495.
(*q*) [1901] A.C. 495, a
(*r*) [1898] A.C. 1.

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defendants had objected to work with the plaintiff on the ground that he was dangerous to work with, and had thus caused his dismissal, which would have been perfectly justifiable. On the other hand, in *Quinn* v. *Leathem* (*s*) it was found that what the defendants did was not for the purpose of benefiting themselves, but of injuring the plaintiff. Where *employés'* own interests are involved, it is perfectly legitimate for them to say to their employer—"Choose between us and him, and if you employ him we will go," or "We will break our contract with you, and will not work further." Such a breach would not be wrongful as against anyone else. There is no case in English law in which any person has been permitted to complain of the breach of a contract to which he was not a party.

[HOOD, J., referred to *George* v. *Skivington* (*t*).]

[*Cussen* referred to *Langridge* v. *Levy* (*u*).]

Although in this case the company might fairly complain of what has been done, the plaintiff cannot. *Cf. Rogers* v. *Rajendro Dutt* (*v*) and *Angle* v. *Chicago and St. Paul Railway* (*w*), where all the cases on this subject are collected. The plaintiff's argument eventually comes to this—that what was done by the defendants comes within the definition of a conspiracy. To constitute a conspiracy there must be a combination to do an act itself criminally or civilly wrongful.

[MADDEN, C.J. Is not the true test that a combination to do a thing which harms another is wrongful? To seduce a woman is not a wrong either civilly or criminally, but a conspiracy to seduce a woman is wrongful.]

The whole history of conspiracy is traced by Pallas, C.B., in *Kearney* v. *Lloyd* (*x*). Between that case and this no distinction at all can be drawn. *Cf.* also *Huttley* v. *Simmons* (*y*), which holds, in effect, that a mere combination of persons, with the desire to prevent a man from employing another, if not conducted by illegal means, does not amount to an actionable conspiracy. Everything depends upon the weapon you use to effect

(*s*) [1901] A.C. 495.
(*t*) [1869] L.R. 5 Ex. 1.
(*u*) [1837] 2 M. & W. 519; [1838] 4 M. & W. 337.
(*v*) [1860] 13 Moo. P.C. 209.
(*w*) [1893] 151 U.S.A., pp. 1-13.
(*x*) [1890] 26 L.R. Ir. 268.
(*y*) [1897] 1 Q.B. 181.

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your purpose. If coercion be used, an action would
more than persuasion be used, no wrong is done. In
the defendants merely announced to the company the
ation of the men; they did not induce the company to
the plaintiff. The plaintiff has not proved that he was
by reason of the action of the defendants. The comp
did, in fact, dismiss the defendant, and the evidence s
on the day of the strike the plaintiff did not go back t

[PER CURIAM. What would have been the use
through such senseless formalities? Clearly one man
work the mine.]

Further, there is no allegation in the statement of
the defendants combined to keep the plaintiff out of hi
ment and prevented him being re-employed. The pla
the district simply because there was no work for him
the fact that there was no work for him to do is too re
the defendants' action. Further, the plaintiff was r
employment (if at all) because the company felt that i
employed him the other men would not work with
that does not constitute any cause of action ag
defendants. No injury has arisen from their actua
assuming a conspiracy, from the purpose of their consp
from the apprehension on the part of the company
whole trouble might be repeated. If the plaintiff ha
employed, and the men had then gone out on strike,
have had a cause of action. To constitute an action
spiracy, the minds of the conspirators must be directe
the particular object which ensues. The defenda
dreamed that the plaintiff would go back to work; the
that once he was rid of that would be an end of t
The men and the company then enter into a new agre
the understanding that the plaintiff is not to be taken
that is the reason why he is subsequently not emp
the conspiracy alleged and proved were that the d
would fill the minds of the company for all time
fear that, if they ever employed the plaintiff, the m
go on strike, then perhaps the defendants would
liable. At the most, the defendants' intention was t

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out of the mine, and, as has been found, this was for
n benefit. And, just as in a case of libel, in order to
a plea of "privilege," you have to show express malice,
n order to get over the plea of "just cause and excuse,"
to show express malice, which the learned primary
s expressly negatived.

el also referred to *Bromage* v. *Prosser* (*z*) and *Pollock*
(6th ed.), pp. 313, 317.

n in reply—As to the period of time when a combina-
o work becomes a combination to injure, see *Walsly* v.
, cited by Lord Brampton (then Hawkins, J.) in *Allen*
(*b*). See also *Vegelahn* v. *Guntner* (*c*), where coercion
means than violence, or threats of it, was held unlawful.
is expressly approved of by Lord Lindley in *Quinn* v.
(*d*). The decision in *Kearney* v. *Lloyd* (*e*) must be
the fact that the plaintiff had no right to a continuance
oluntary contributions, and therefore no right was
with; if not, then it is inconsistent with *Quinn* v.
(*f*) and *Gregory* v. *Duke of Brunswick* (*g*). *Huttley* v.
(*h*), being based upon the decision of Pallas, C.B., in
may also be disregarded. To "intend" an act means
to the consequences of the act, and in that respect
that in the law of torts you have hardly anything to
proving intention as a fact, while you have, perhaps,
o do with motive except as proof of intention. In
law, of course, motive, as proof of intention, is very
. As an example of intention being important, suppose
arises as to the remoteness of the damage from the
the answer may be—"You have removed all difficulty
core, because you have shown by your very acts that
ded to injure this man, and therefore we need not
bout that." Conspiracy is based upon agreement, and,
there must necessarily be in all cases of conspiracy a

5] 4 B. & C. 247.
1] 30 L.J. (M.C.) 121.
8] A.C. 1, at p. 23.
3] 167 Mass. 162.
1] A.C. 495, at p. 539.
(*e*) 26 L.R. Ir. 268.
(*f*) [1901] A.C. 495.
(*g*) 6 M. & G. 205, 953.
(*h*) [1897] 1 Q.B. 181.

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common intention. The contention that the defen
the *right* to work how, when, where, and with whom
would have been correct if it had been said that th
liberty to do those things. But even if the defendant
right, so has the plaintiff; and that is the answer to
Every man has the right of freedom of action in
his trade, and to be immune from active interferen
especially by a combination. The Court does not co
with the differences between *employés* and their em
will not decide which of them is right. I quite agr
question whether there is just cause or excuse is one
not of fact. Where it is found that the only interes
defendants have is a possible advantage in an econom
that cannot be held to be a just cause or excuse. Th
to be determined is—"Was the defendant using
really to further his own interests, or, while u
to further his own interests, was he using them to
plaintiff." In the *Mogul Case* (*i*) Lord Bowen s
intentionally to do that which is calculated in th
course of events to damage, and which does in fa
another in that other person's property or trade is a
done without just cause or excuse." Lord Hersche
v. *Flood* (*k*), characterizes this statement of the law
for reasons which he gives. If it had been quali
proviso "except where the doer was doing the act in
of a right *in rem*," Lord Herschell would probably
no fault with it, and the proposition would be uni
I admit that, where the defendant is merely exerci
of his own, the onus is not on him to show "jus
excuse." There is a difference between a conspirac
and a conspiracy to do a wrongful act, because in no
the latter can there be a "just cause or excuse."

Higgins, K.C. (by permission) referred to the
Walsly v. *Anley* (*l*). That case was in 1861, before
tion of the law as to strikes. He also referred to th

(*i*) 23 Q.B.D. 598, at p. 613. (*k*) [1891] A.C. 189, at p. 3
(*l*) 3 E. & E. 516.

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or v. *Kent* (*m*), and to the *Mogul Case* (*n*), per Lord l, commenting on the decision of Crompton, J., in . *Eckersley* (*o*).

Cur. adv. vult.

DEN, C.J., read the following judgment:—This is an om the judgment of A'Beckett, J., in so far as he decided defendants, other than the defendant the Victorian ers' Association, were entitled to judgment.

laintiff is a miner by calling, and was employed as such ine of the Outtrim Coal Mining Company at Outtrim. endant, the Outtrim branch of the Victorian Coal ssociation, is a branch trades union, of which most of *loyés* of the said company were members. The ts Gray, Kirby, and Gregory were *employés* of that , and were members of the branch union. The t Wilson was general secretary of the union, and as the f the company's mine were under their agreement of ent to be paid according to the quantity and class of ch they extracted, Wilson was permitted to attend the t as an *employé* of the company, but as an inspector or n behalf of the miners, to observe and calculate what e agreement they were entitled to be paid by the .

laintiff, some time before he had come to the employ- the company, had come into collision with another trades e Victorian Amalgamated Miners' Association, of which een a member. Some of the members of a branch of n had been, together with the plaintiff, employed in a e at Eldorado, and had struck work in relation to an l dispute with the owners of that mine. It is un- to enter into the merits of Martell's difficulty with ion. It is enough to say that, for reasons which sufficient to themselves, rightly or wrongly, the union considered that the plaintiff had taken a course which chievous to their union, and they expelled him from it. rds the plaintiff come down to Outtrim, and entered the

891] 2 Q.B. 545, at p. 551. (*n*) [1892] A.C. 25, at p. 46.
(*o*) [1856] 6 E. & B. 47.

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employment of the company there as a miner, as I
After a time an official of the Eldorado union commun
letter on 13th June 1902 to the defendant branc
Victorian Coal Miners' Association, that the plaintif
Jeffs and one Cuddy, who had also incurred the disap
the Eldorado union, had blacklegged, and were of
contemptible character. A week before this the pla
the defendant Gray, as president of the local branch,
to become a member of the union, and tendered
necessary subscription to the funds. Gray declined
the money, saying that they had had several a
letters complaining of the plaintiff and others.

On the 14th June, the plaintiff attended a committe
of the branch union, and Gray stated that the plaintiff
there in consequence of the rumours against him. Th
then detailed his version of what had occurred at El
he describes in his evidence, and as appears in less de
Exhibit J produced, which he signed at the meeting,
he says, the final words, "would abide by the decisi
committee," which he believes were added after he h
though the defendants deny this. The committee
they would consider the matter, and let him know
They never did let him know anything further in
plaintiff, after the 14th June, continued to urge his
to the union, and offered the necessary money, but it
be accepted by Gray, the secretary, or Gregory, the pre

A meeting, however, was held by the member
Outtrim branch union on the 29th June to cons
question, and the defendants Gray, Gregory, Kirby, a
were appointed a committee to call on the manag
company, and Martell's case was left by resolution
hands. On the 30th June the defendants, except W
accordingly see McKenzie, the manager of the compa
office, and Gregory, who was chief spokesman, said—"
three undesirable men working in the mine. I will
till Saturday to move them along the track." M
"What are their names?" Gregory—"Cuddy, J
Martell." McKenzie—"It's a bad thing to take the

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ut of men's mouths. It is a matter for the directors to
The defendants then left.

he 3rd July the legal manager, Nicholson, wrote to
endants a letter, reciting what had been said by
the deputation on the 30th June, denying their right
e to the directors what men they should employ, but
g them that the directors had no wish to employ any
o was undesirable, and asking to be informed in what
he men referred to by them were deemed undesirable
e employed by the company.

defendant Gray, as secretary of the defendant, the
nion, by a letter dated 5th July 1902, curtly replied
e only explanation the members of this lodge have to
s given verbally to the mine manager by their repre-
on the 30th ult."

he 6th July a meeting of the lodge members was held,
, according to defendant Gregory's evidence, a variety
proposals were made, but "the only resolution they
ake," he says, "would be adopting the recommendation
ommittee—seven days' notice," and a deputation was
d to wait that afternoon on the manager, to consist of
ts Gregory, Gray, Wilson, and O'Carroll, McLaughlin,
es. This deputation did accordingly wait that after-
McKenzie the manager, but, being Sunday, he refused
s with them, but he appointed to see them next day,
ave Stamp, the chairman of directors, present. Accord-
e deputation came again next day, the 7th July, to
e's office, where Stamp also was, and some other
including Davey, a clerk, who had taken minutes in
of what had been said at the meeting of 30th June—

Kenzie—Mr. Wilson has no right to be present, as he is
of the company's workmen.

son and James—He is here as representing the district
.

mp—What do you want?

gory—The whole thing is already on the minutes. We
ven you to Saturday to shift those three men along the

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"Stamp—Put what you want in writing, to be subr the directors.

"Gray—The whole matter hinges on those undesira and the body of men won't work with them."

The deputation then withdrew, and proceeded to t where the body of miners were. Gregory got on a wood and addressed them, describing what had passe interview, and saying they had got no satisfaction. then struck work, and went in a body to the local ha speeches were made. In the result, the strike continu the 18th July. Meanwhile, the plaintiff was compelled the boarding-house at which he had been accustomed t it does not appear by whom, nor how. He then went with a Mr. Barton, who offered to take him in. On the of the 10th July a body of the coal miners, accompa some women, assailed Barton's house, and proceeded t into it. The plaintiff and Barton, and one Nicholls, also in the house, defended it until the window was brol the door burst in. The plaintiff then offered to surren Barton asked the crowd if they would take the plaint safely if he surrendered. They said they would, plaintiff then got out through the window, and was s the crowd, who threatened to tar and feather him. Th then arrived, and arrested one of the crowd, and for safe the plaintiff and Barton and Nicholls to the police where they were lodged. The mine was then, in conseq the strike, completely idle, because those who were w work could not, in the absence of the great body *employés.*

On the 11th July the plaintiff went to Melbourne, w stayed until the 21st July. Meanwhile, the defendant letter dated 14th July 1902, informed the manag instruction of his committee," that "it is currently that Messrs. J. H. Martell, William Cuddy, and Clarer have left the district. If there be any truth in the rep committee are prepared to advise the members of the mentioned lodge to resume work." The manager repl "my company is prepared to re-employ, under the sa

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:hat existed prior to the 7th instant, the workmen who :rike," and he required those who desired to enter the of the company to sign the rules as theretofore. The hen all signed on, and resumed work.

:he 21st July the plaintiff returned to Outtrim, and to the mine manager, McKenzie, under protection of a e, and desired to resume his work at once. McKenzie, ne time, told him "he did not think he could employ er the circumstances which had arisen at the mine," and him to the office in Melbourne. The plaintiff then thither, and saw the legal manager, Nicholson, told him cKenzie had said, and asked him if he would employ icholson replied that "he could not, as a deputation e Association had waited on the mine manager, stating :hout they had me removed within seven days the ld be thrown idle, and under these circumstances the and he had considered the matter, and agreed that uld have to discharge me through the deputation that ted on the mine manager." Mr. Nicholson, like the anager, expressed regret at this necessity, saying that ntiff was one of the mine manager's best miners. The thus lost his employment, and has never since been able any in his own occupation as a miner.

he 71st rule of the company, which rules are accepted g by all persons employed in the mine, it is provided ery man or boy employed at the colliery shall give to eive from the manager fourteen days' notice before ion of employment." The rule contains provisoes which uggested to have been applicable in the present case.

sel for the defendants have strenuously contended —

at the defendant, the branch union, had no part in what d at all. It is clear that its members duly met, and d the individual defendants a committee to deal with matter; that they met again, and heard that com- report of what it had done, and fully approved, and ft the further prosecution of the matter to that com- nd added other members to it; and after the strike

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still approved of what had been done. Moreover, th
of the 5th July 1902, from the secretary (above refe
is a pretty plain admission that the lodge was i
It is true that Mr. Wilson kept on asserting that
not "acting officially," and that he deprecated any s
but in view of what was obviously happening about h
sort of diplomatic denial of sympathy and assertion of
tion is to be very little regarded. Wilson, like the oth
not have been quite certain that he was not doing w
illegal; but he and the others could scarcely fail to kn
at the best, they were acting on the outside edge of
They naturally felt the wisdom, in those circumstances,
guarding, if they could manage it, the union funds,
affected an unwillingness, and a show of moderation, wh
knew would be disregarded by the others—

> "And let their hearts, as subtle masters do,
> Stir up their servants to some act of rage,
> And after, seem to chide them."

In my opinion, the branch union was, in fact, just
involved in what was done as were the individual defen

2. It was also argued that the individual defendants
threat of a strike at all. It was, in the first place, asse
them that the phrase, "we will give you seven days to s
along the track," was not used at the first intervi
McKenzie. I think that, corroborated as the evid
McKenzie is by the written minutes of Davey taken at t
the words were used; but if they were not, it seems cert
words to just the like effect must have been used, becaus
evidence shows that the defendants undoubtedly
McKenzie to procure him to send Martell and the othe
and within seven days, and that they in some words or
intimated to him. Then it was contended that the wor
will give you seven days to send him along the track,"
did not threaten a strike, but merely a limit of time, aft
the defendants would resolve on some further step,
there was not, in fact, any anticipatory resolution
members of the union to strike. Everything in the tra
contradicts this view. The very threat of giving hi

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ıveys a threat of a strike. What else could they do to
their purpose? If they contemplated actual violence
their end, that would be even more illegal than a strike.
the defendants Gregory and Kirby in their evidence
e matter very plain. The former swears that, at the
w with McKenzie on 30th June—"We toward the end
l the manager three men were working in the mine;
ısing a good deal of obstruction amongst the miners; were
ed undesirable; and after seven days we do not intend
along with them."
y also swears, speaking of the same interview—"After
of discontent amongst miners three men there considered
ble; they refused to work with them after seven days."
as argued, also, that the strike was unintended, at all
t the time that it occurred, and that it resulted really as
lsive outbreak by the men. The evidence already quoted
his view, too, cannot be accepted. Besides, the rest of
ers at the mine were assembled pending the result of the
w. Gregory addressed them in a speech at the mine
tely he left the interview with the manager and the
n of directors, and the men at once struck. Besides, the
ving done so, the defendants made no attempt to get
resume work until they were sure that Martell had left
rict; and then Gray, speaking for the strikers, writes
r of the 14th July, and on the 18th July they all return

e is no evidence that the defendants had any personal
the violence of the 10th July; but they attended
to help the rioters after the event, and to provide for
fence. Wilson, too, spoke at the meeting deprecating
nd violence, but it must be remembered that whenever
iracy is entered into to effect a given purpose every
tor is liable for the acts of every other conspirator
e done in furtherance of the common design. In this
members of the branch union were co-conspirators with
vidual defendants to force Martell out of his employment
ing coercion and intimidation to bear on his employer.
ous attack on Martell was undoubtedly made, in my

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opinion, to drive him away, and to impress the compa
apprehension as to what might happen if it resisted furt
coercion of the conspirators, as it had so far done. And
the individual defendants would have wished it otherwi
are, I think, affected by the violence resorted to
co-conspirators in furtherance of the common object. V
starts a fire is liable for the mischief which it does. I
further point presented to us that, so far as the plaintif
on any threat by the defendants that they and th
miners would break their contract of service by go
without having given the fourteen days' notice required
71, the defendant Wilson could not be liable in this
because he was not an *employé* of the company, and so
contract to break. He was, though not a member
committee of the union, as appears from his evidence,
present at its meetings as check weigher, and he confesse
a very prominent part during the whole business in q
And if it amounted to an actionable conspiracy to coe
intimidate the company by, amongst other things, a thre
its *employés* would break their contracts, Wilson was c
a party to that conspiracy, and also to the threat, which,
was made, and that would make him liable as much
others would be, because the conspiracy would be the gis
wrong, and not the means by which it was to be effectua

Finally, it was contended that the plaintiff was not
from the service of the company, but chose himself to te
his employment, by leaving and going to Melbourne; a
the company's refusal to employ him, when he returned
21st July, was a mere prudential determination in th
interests; that as he had himself solved the diffic
leaving his employ, he left them at liberty to exercise the
of preferring to be without him. But the answer to this
the strike having occurred, there was no work to be
any *employé* who was willing to work, as the plaintiff sv
always was. While this state of things continued, the
was forced by the violence of those who had struck, as a
the defendants' stratagem, to fly from Outtrim. As
work was resumed at the mine the plaintiff return

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d himself to the manager as ready to resume his work, the mine manager and the legal manager, with expressed regret, and fully recognizing his value as a formed him that, having regard to the embarrassment the defendants and the strikers, they could not allow turn to work. Whether this, in all the circumstances, to a dismissal of the plaintiff from his existing ent, or a refusal to re-employ him, desirable *employé* e was, because the company dared not, it was either a of him from his employment, or a cesser to employ ght about by the acts and coercion of the defendants; tatement of claim complains of both.

, then, is the position of fact which all this shows? The ts, and the members of the branch union, were quite vith their own positions. The pay was satisfactory; management was so too. There was nothing at all to assail their union, or contravening the principles abled it to exist and operate so far as it legally might. as admittedly a very capable miner. No one suggested was careless, or incapable, or dangerous to work with. t suggested that he was dishonest, or of evil character y understood, or given to disgusting or discreditable r infected with contagious disease, or that there was about him which, under ordinary circumstances, might him objectionable to reasonable men. The moment nd the other two men had been driven off, the miners all returned to work just as before, without any change equest for a change. There was, therefore, nothing at hich in any reasonably direct way involved their own personal, or business interests or advantage.

lefendants' admitted purpose in together calling on the and "giving him seven days to send the plaintiff along k" was not to gain any suggested advantage to them- or any consideration for their union. It was a stolid, lemand for his ostracism, on their mere assertion that he desirable." Being asked to say why, they reply—"The planation this lodge has to make was given verbally to manager by their representatives on the 30th ultimo;"

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that is to say, they again vouchsafe the statement tl
"undesirable," and nothing more.

In this action they have attempted to justify, by
that he had in an industrial dispute, in which another
which he was a member, was engaged, done somethi
had given that union offence. It does not very plain
in evidence what his offence was. The plaintiff
protested before the defendant branch union that he
in part wrongly accused, and that, so far as the fact
against him had any foundation, he was fully justifie
let it be assumed that he was wrong, and that the oth
was justly affronted, the defendants' claim was, and is
such a reason they had a right to insist that the plainti
pursue his calling and means of livelihood no more wh
were, and that they had the right to join together and
plaintiff to abandon his calling where he chose or
convenient to pursue it, by threatening their common
with great and immediate loss if it did not expel him
service within seven days.

The plaintiff's presence in this mine could not poss
the defendants' union, because he was not a member o
owed it no allegiance, and they positively refused to a
to expiate any former default by submitting to thei
discipline, by becoming a member of it. And yet b
law, for anything that appears, he was in all respects a
man as any of them. If this union, and these defendan
with it, and for it, could do this thing, so could eve
union in Australia, until the plaintiff in effect w
forbidden to live within the continent. If this be law
any trades union whatever may effectively impose u
man who chances to offend it a penalty graver t
constituted tribunal of the land could impose for ex
grave crimes.

I am very appreciative of the rule that a Court o
ought not to interfere with the findings of fact of the
Judge of first instance, where the evidence in some spe
could be more effectively criticised or examined by him
the Court of Appeal. But here the evidence is in all

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xaminable by us as by His Honor. Indeed, I do not my view of the evidence involves any alteration of His Honor's findings, except that, from the same ed facts, I draw an entirely different inference to that n my brother A'Beckett guided his judgment. His ought that the facts proved showed that the defendants, t they did, were merely *bonâ fide* pursuing the assertion tenance of their own material business advantage, and plaintiff was overwhelmed as an unfortunate but e incident to their exercise of care for their own I, on the other hand, conclude that those same facts ainly that the defendants' primary, and indeed only, and intention was to punish the plaintiff by depriving his means of living because he had offended another d that without intending to effect any other purpose, d having any purpose to effect, for their own advantage. vhole evidence were not eloquent of that fact, the of John Butler, who, though no longer a member, was a hairman of the defendant branch union, is strong to (I have so far altered the notes of evidence as to put nce in direct narration.) He saw the defendant Gregory, —"I want to speak about Martell; he came to me , and asked me for advice as to the difficult position he I advised him to work and be quiet for the present, onsequence, I now want to consult you. It will be give him another chance; let us not kick a man when n. Assuming he has done wrong, he is now trying to ght." Gregory: "So far as I am concerned, he will pad his hoof,' if it took twelve months' stoppage to get whatever he may be now." I: "I am sorry." Gregory: damned good enough for a bloody scab."

urse it is quite plain that trades unions would, from the ect of ambition or power, gain an immense advantage if llowable to them to deprive of all rights of pursuing the r which he had been trained any man who offended em, because then no man could dare to oppose them. aw most certainly does not permit them to add such a this to those by which it is usefully and properly per-

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mitted to unions lawfully to support their members
of their own labour to the best advantage. I think t
consideration His Honor's inference was erroneous, a
stand the legal principle which is the guide on such m
to which I will allude presently.

In my opinion, then, the question which the facts
consideration is this: Is a combination of persons, v
to procure the exclusion of another person from the e
of a common employer, by means of threats and co
procuring such exclusion in fact by such means, i
lawful, and if so, is this such a case?

The law which relates to this class of injury has,
reasons, become exceedingly diffuse, and much
difference is disclosed between the highest autho
close examination of the differences will discover
principles of the law which are to be effective, and w
rationally, on this subject, are now fairly clear
generally accepted. It is impossible for the House
overrule any of its own decisions, but if *Allen* v.
depends for survival on any difference between it an
Leathem (*q*) as to the principle on which the latte
decided, and if the House of Lords could overrule any
decisions, I think it would, and should, overrule *Alle*
and moreover, I believe that, so far as it can
overruling it, it will go. Of course, the majority of
in *Allen* v. *Flood* regarded the facts in a way which
support the mere decision, and Lord Watson, in hi
judgment, pointed out that, even if the facts had bee
than he found them, the pleadings were so frame
plaintiff could not have had judgment. His Lor
devotes much of his observations to the annihilat
dictum of Lord Esher in *Temperton* v. *Russell* (*r*), th
otherwise lawful may become unlawful if done with
or malevolent motive;" and in his fervour to do this
the law, His Lordship, in one or two places, seems
the clearness of his own definition of what the tru

(*p*) [1898] A.C. 1.

(*q*) [1901] A.C. 495.

(*r*) [1893] 1 Q.B. 715.

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is by declaring, with reiterated insistence, what it is

Quinn v. *Leathem* (s) the judgments of Lords Halsbury, on, and Lindley contain, in a form as lucid as convincing, definition of the legal principle, so far as it is possible to it, and good reason why it is impossible to define it ively, together with the true rule for applying the e in those cases in which, having regard to the facts, it t instantly and obviously apply itself. These admirable nts, too, leave nothing to be desired or improved upon in alysis of the authorities which authenticate them, and re, sustained by them, I am content to leave further ation of the principles involved and their history to those nk that any new exposition is possible and desirable.

d Halsbury very usefully reminds us, in his judgment in v. *Leathem* (s), that our law is not, and is not intended to essarily a logical code. Indeed, it is claimed that a chief f the common law of England is the quality of elasticity hich it may adapt itself to the ever-changing conditions ress, while observing still to the utmost that justice, in onditions, makes possible the great basic principles of An attempt, then, at a definition of the principle ple here, which should aim to be exhaustive of all possible would merely obscure, by kicking up the dust of a d exceptions, instead of attaining its purpose. What has rrived at in *Quinn* v. *Leathem* (s) therefore provides, as said, definition so far as it is possible, and reasonably guidance to solve so much as is not defined as occasion

brother A'Beckett thought below that *Quinn* v. *Leathem* (s) different in its circumstances to the present case that quite beside the matter, and that there could not be any bout the illegality of the acts committed in that case. If, r, the factors of this case be substituted for those in v. *Leathem* (s), it appears to me, with the fullest respect, ey are practically parallel. If for Munce be substi- the Outtrim Company, and for Quinn the defendants,

(s) [1901] A.C. 495.

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and for Leathem the plaintiff, then the facts in bo
present in effect the same considerations.

His Honor was also much pressed apparently with th
that in *Quinn* v. *Leathem* (*t*) "there is a most distinc
nition of a malicious motive as being that which led to
being committed," and he cites Lord Macnaghten's judg
p. 511, 512; but as I understand His Lordship's judgmen
referred to, he was not insisting on a "malicious motive
sense of a malevolent motive as an essential of a cause of
but in order to point out that the defendants the
not *bonâ fide* pursuing their own business interes
were really aiming to harm the plaintiff. Moreove
Macnaghten, like all their other Lordships, disapprov
Esher's view that express malice or malevolence of moti
make an otherwise lawful act unlawful. I take it th
dictum of Lord Esher's in *Temperton* v. *Russell* (*u*)
certainly universally denounced as erroneous, whateve
there may be.

A mortgagee whose mortgagor is in default may fro
hatred against the mortgagor sell the mortgaged prope
ruin the mortgagor, though otherwise he would be willi
the default continue. A man may publish the most s
defamatory matter of another, whom he hates, merely to
his malice, if he can prove it to be true; and so in a gre
instances. In both *Allen* v. *Flood* (*v*) and *Quinn* v. *Lea*
all the Lords, I think, are clear that evil motive has no
do with such cases as the present as affecting a cause o
though a wickedness of motive may, if it be discernib
useful guide in judging of the question of fact—
defendant really intending to pursue the lawful pu
advancing his own business and interest, and in so doing
the plaintiff; or was he really intending to effect the
purpose of harming the plaintiff in the exercise of his
rights without lawful excuse? I allude to this
A'Beckett, J., seems to have finally convinced himself
judgment should be for the defendants by what he says

(*t*) [1901] A.C. 495.
(*u*) [1893] 1 Q.B. 715.
(*v*) [1898] A.C. 1.

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he Appeal Book. His Honor there, after pointing out *en* v. *Flood* does not deny "the right of a combination men" to intimate to their employers that they will not "a certain person, or certain men, are retained in their nent," then says:—"They, giving that intimation not to malice felt with reference to those men with whom they work, not prompted by a desire to injure those persons, the desire to strengthen their own combination, by g from employment with them persons who are not, as pose, fit to be associated with them in their union, is not l act; and I think that nothing more has been done in . I find against the existence of that personal malice is said may forfeit the privilege within the meaning of age I have read."

ve already pointed out how, in my opinion, the nts could not, and did not, have any purpose to advance n business or just interests, except in so far as they trengthen their union by terrorizing all who offended preventing the plaintiff from exercising his legal rights sing of his labour as he willed, or at all. If this be so, ether the defendants loved Martell or hated him cannot e case. There seems little reason to believe that they m much; but though they loved him as much as did his daughter, like that conscientious hero they on sacrificing him to maintain respect for unionism in ract, and if hate was their personal attitude, instead of the result is equally to intrude on Martell's legal right rty in either case, and with the same harmful conse- o him.

ng stated the facts, and my opinion of their effect, and ndicated what appear to me, with great submission, s views of the law which relates to this case, I now o state what I believe to be that law. I have already t, so far as they differ, if they really differ at all, in ing the true principle, I prefer *Quinn* v. *Leathem* (*w*) to *Flood* (*x*). In this view, I am further strengthened by s decided by the Court of Appeal in England, the reports

901] A.C. 495. (*x*) [1898] A.C. 1.

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of which have reached us since the argument closed are—*Glamorgan Coal Company* v. *South Wales Federation* (y) and *Giblan* v. *The National Amal Labourers' Union of Great Britain and Ireland* (z) decisions adopt the principle as laid down in *Quinn* v. That principle is, that where a combination of persons act with intent to harm another or others, withou excuse, and harm in fact results to him or them, an ac for damages by the person or persons harmed.

Every word in this definition is carefully chosen, every member of the sentence was, when expressed by c accurately appropriate words, the cause of temporary o and the subject of the warmest controversy.

Lords Halsbury and Ashbourne and Lord Watson Davey have expressed the opinion that, wherever an in "does the act with intent to injure," he would be liab other conditions also exist, and I think so too. The law a man's person and property and good name from th assaults of every other person, and it seems impossib how his means of earning his livelihood should be ex illegal destruction by one any less than when many ef harm; still, for to-day's purpose it is sufficient if protects the plaintiff from the illegal interference with to earn his living his own way by a combination of because such a combination is established here; a certainly now clear law that a combination of person always has been held by law to be more dangerous to, a irresistible by, an individual than the act of an indiv intentionally do an act to harm another without lawfu is an actionable wrong by that other if harm to hir ensues.

In 1894 I had to deal with a case a good deal re the present one—*Taff's* v. *Beesley* (a)—and I then expr law to be as these much-discussed cases finally declare I do not find anything to alter in the view I then tool the questions which have been controverted in *Allen* v.

(y) [1903] 2 K.B. 545.
(z) [1903] *Times* L.R. 708.
(a) 16 A.L.T. 59.
(b) [1898] A.C. 1.

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nn v. *Leathem* (c) arose in it. In stating what was the of law which the jury should consider, and which was e as that which I now adopt, I said, at p. 62—"The of British freedom is this, that every man is at liberty thing he wills to do, the thing itself being not expressly by law, nor in itself evil, provided he does it in such is consistent with permitting every other individual in nunity doing the like." This is a spirit which is to be nderlying almost every broad principle of our law to personal liberty, and if the definition which I have tated be considered in this light, no reasonable man ink, find fault with it. Everyone is, as I expressed it v. *Beesley*, at p. 62, "left at liberty to advance himself usiness; he may use every faculty, or advantage, or hich he possesses to drive himself on in the world, and not care one jot how much his superiority of means, or or enterprise destroys the chances of another. He may ers as far behind in the race as he can, using his own for his own advantage. But he must not play foul other man; he must leave him his equal chance too. t leave him his own advantages, and he must not with that man using his advantages and his ities to drive himself along in the race also."

always a just answer to one who complains that another ng him by the way in which that other chooses to is own business, that he is doing only that, and that he eking to trammel him who complains in doing the like ooses. The one is doing what is lawful in itself, and equally open for the other to do, if he will and can, and harmed that is no matter for complaint, for it is

also disposes of the argument that the test is whether complained against does the act complained of with a nt desire to injure the other; because, if he is only hat by law he is at liberty to do, it does not matter he succeeds with malevolent gloating or with honest y at the loss which the man complaining sustains.

(c) [1901] A.C. 495.

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Primâ facie, all acts done with intent to harm an unlawful, and therefore it is that the term "withou excuse," is added to the definition. A man, as I hav said, may not only intentionally, but wickedly, harm a he has a legal right to do it, and his legal right is in his "lawful excuse."

As I have already said, too, where all that is don intentionally, and even with the knowledge that it w another, or others, in business, and they are harmed, done honestly to advance the doer's advantage or inter fact is the doer's "lawful excuse." He insists on the competition, and that it is in the nature of things that th will prevail, and the weak will go to the wall." And so ever-varying cases, whose special incidents can never be by precise definition. If the definition and the un principle be remembered, then in a great number of mere statement of the facts shows at once whether the c is legally just or unwarranted. In many cases, howe "lawful excuse" alleged may be entangled by compl facts, or obscurity in evidence, and then its deter becomes a question of mixed law and fact for the Court

In all the controversy which has prevailed around the of the question in issue in this class of cases, the great j of Bowen, L.J., in *The Mogul Steamship Company* v *M Gow & Co.* (*d*), has been an ever efficient guide in obscurities and the triumphs of the discussion; a hel and questioned by none; and it indicates clearly the pursuit of the "lawful excuse" in all cases.

Where the dominant purpose and intention is to and really pursue one's own business or lawful advant is a lawful excuse for whatever is done, no matter wh harms.

Where the dominant purpose and intention is another, and to thwart and hamper him in the exerci rights or the pursuit of his business or lawful advan harm is caused to him, the persons, at all events, who so to so thwart and hamper him are liable, by whatever

(*d*) 23 Q.B.D. 598.

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ing their own business or advantage they may obscure
ter.

ying the facts of the present case, there was assuredly a
tion of the defendants, with a dominant intention to
the plaintiff to be deprived of his employment, by
and intimidating their common employer by threat-
grievously embarrass its business by leaving its mine
miners. This was necessarily an attempt to hamper
barrass the plaintiff in retaining his employment, and
argaining for future employment, because mine-owners
be expected, out of mere philanthropy, or even British
independence, to persist in ruining their business in
stand against oppression exercised against one or two
men.

action of the defendants worked harm, in fact, to the
, because he lost his employment. The defendants are
the wrong, *primâ facie*, and being asked for their
excuse, they allege that what they did was a simple
of their legal right to take steps to protect and maintain
n business interests. If that were true it would be a
stification. In my opinion, for the reasons already
it is false. The only possible relation which the
nts' own material interests could be suggested to have
natter was altogether remote, and also depended on an
supposition of right. All the defendants involved in
eal are liable to indemnify the plaintiff his loss. As
said at the beginning, the defendant, the Victorian Coal
Association, was acquitted of any participation in the
plained of, and the plaintiff has not appealed against
quittal. Then, by some accident, it is said, while the
nt, the Outtrim branch, was properly joined in the
was not properly joined in the statement of claim.
citor for the defendants very properly drew the atten-
the plaintiff's solicitor to this fact, and desired to be
d if it was intentional or an accident, and he was told
ll right. That defendant then treated the action as
nued as against it, and delivered no defence. Counsel
l for it at the hearing to see to judgment being entered

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as for a discontinuance, and he drew attention to the
No amendment was then sought by the plaintiff, an
opinion, this defendant was then, and is now, en
judgment as for a want of prosecution. The plaintiff
as against it must be by a new action if he desires t
any. As against the other defendants, the plaintiff i
to judgment.

He is described as a very skilful miner. He was
10s. per day wages from the company. He has not b
since losing his employment with it, to obtain any
his own occupation as a miner, though he has obtain
mittent employment in other ways for short periods.
he was five or six months without any work, though
able and willing to work, and this represents, at six
week at 10s. per day, 72*l.* To that he is clearly entitle
also entitled to damages for future loss, from being u
obtain employment as a miner. There is no means of m
this, but it is certain that he will not find it easy to
reason of the disfavour which the defendants have
upon him. I think the sum of 28*l.* will not be an unre
amount to add to the 72*l.* in respect of future damage
a round sum of 100*l.*

Appeal allowed, with costs to be taxed, as ag
defendants Gregory, Gray, McEwan, Wilson, and
Judgment entered below for the defendants Gregor
McEwan, Wilson, and Kirby to be set aside, and judg
be entered for the plaintiff as against them for 100*l.*, w
to be taxed. Appeal dismissed as against the defen
Outtrim lodge or branch of the Victorian Coal Miners'
tion, without costs.

We think that, as one solicitor and the same couns
sented all the defendants, and as no special costs co
been incurred on behalf of the defendant branch, a
was as much to blame as the other defendants in
ought not to allow any costs of the appeal to it.

HODGES, J., read the following judgment:—Be
matters occasioning the present dispute arose the plai

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vorking as a miner at Eldorado, and had been a member nion there, when a dispute arose between the employers iners. According to the defendants, the plaintiff behaved erously to his union, was ostracised, and left the district. me to the Outtrim mine, and commenced work at that y on the 1st of June 1902, and continued working there he 7th of July. Meantime, inquiries were being made by uttrim branch of the defendant Association as to the stances under which the plaintiff was expelled from the n union. The defendants Gregory, Gray, McEwan, , and Kirby were all members of the Outtrim branch, rther, were members of the committee of that branch, l the men working in the mine except the plaintiff and hers were members of that union. Some course of action solved on, though it is difficult to say what was the exact ter of the resolution, but it is fairly clear that, as the of their deliberation, the defendants Gregory, Gray, n, and Kirby waited on the manager of the mine on the f June, and informed him that the members of the branch e manager of the mine until the following Saturday to the three men from the mine. This was not done, and 7th July the defendants Gregory, Gray, Wilson, and again waited on the mining manager [at this interview amp, chairman of directors of the mining company was esent with the manager]; informed him that he had been ill Saturday to remove the three men; that they had not emoved from the mine; and that they would not work hose men. The three men were not immediately ged, and thereupon all the men in the mine (except the immediately stopped work. The union men engaged in e were not engaged by the day, but by their agreement e mine-owners could not lawfully stop work without a fortnight's notice.

objection of the union men to work with the plaintiff other two men was not because of their unskilfulness or etence, but solely on account of their not being members union, and of the plaintiff having quarrelled with the n union or that union having quarrelled with the

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plaintiff. Though the plaintiff was not discharged, his
ment with the mining company came to an end, and t
stopped working, and when it again resumed work, the
in consequence of what had taken place, was refused
ment. In my opinion, the above are all the facts whi
necessary to consider to determine the case under consid
and I infer from them—

1. That the defendants, as well as the other member
Outtrim branch of the defendant Association, agreed tog
get the plaintiff out of the mine.

2. That with that object, defendants Gregory, Gray, M
and Kirby, representing the Outtrim branch of the V
Coal Miners' Association, waited on the manager on t
June, and gave him until the following Saturday to
of the plaintiff.

3. That on Monday, the 7th July, as plaintiff w
engaged in the mine, the defendants Gregory, Gray, Wil
others, as representing the said Outtrim branch, had a
view with the manager and the chairman of director
mining company, and required that the employment of
should be instantly determined, and as it was not, t
mediately, and without further notice, called the men
the said Outtrim branch out on strike, and such men w
on strike.

4. That by reason thereof, all work in the mine ceas
the plaintiff lost his employment, and when work was
in the mine plaintiff was refused employment.

The above facts and inferences prove a conspiracy
the said defendants and others to coerce the proprietor
mine to get rid of the plaintiff, and to coerce such propri
going out on strike without giving fourteen days' n
required by their contract with the proprietors. The m
out on strike pursuant to such conspiracy, and the
thereby lost his employment, and was also, by reason
coercion, refused future employment. This, in my opini
the plaintiff a cause of action against the persons whom
named as defendants. But before stating my reas
considering that these facts establish a case agai

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defendants, it is necessary to notice two objections that were urged against the case being put in this way against the defendants. It was argued—(1) On behalf of all the defendants, that if the pleadings were (as in my opinion they ought) to be limited by the particulars, the case was not presented in this way against the defendants—that the pleadings nowhere alleged breaches of contract by the defendants. The third paragraph of the claim alleges that the defendants, and each of them, "wrongfully and maliciously, by wrongful and malicious threats, acts, and conduct, induced, procured, and coerced the Outtrim Howitt and British Consolidated Coal Company No Liability, in the employment of which company the plaintiff then was as a coal miner, to cease to employ the plaintiff as a coal miner on its mine, and to dismiss him from its employment."

And the fourth paragraph alleges—"During the months of June and July 1902, the defendants, with the object and intention of injuring the plaintiff herein, and depriving him of his employment and chances of employment, wrongfully and maliciously conspired and agreed together to wrongfully and maliciously induce, procure, and coerce his employer, the Outtrim Howitt and British Consolidated Coal Company No Liability, by unlawful acts, threats, and conduct, to cease to employ the plaintiff, and dismiss him from its employment."

And the particulars in paragraph (*i*) complain—"Striking work and causing the *employés* of the said company to strike work because the said company did not dismiss the plaintiff, and thereby causing all work in the said mine to cease, and the whole mine to be thrown idle, with the view of coercing and forcing the said company to dismiss the plaintiff herein, and cease to employ him."

Now if, after the word "striking," there were added, "without giving fourteen days' notice," or any words to that effect, the objection would utterly fail; and the words in the pleadings "wrongful threats, acts, and conduct," and "unlawful acts, threats, and conduct," make it reasonably plain what was intended by the pleader, and as the whole matter was discussed at the trial any amendment necessary should be made without the imposition of any terms. This objection should, in my

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opinion, be overruled. Then it was said (2) that Wil
a different position from the other defendants; th
practically done nothing to make him liable. But
member of the committee of the Outtrim branch; he
the deputation that waited on the manager and ch
directors on the 7th July, which resulted in the
called out. Whatever views he may have entertained
wisdom of the procedure that was adopted, I canno
the slightest doubt that, when a majority had determ
course, he meant to stand by the union and act
majority, and that what was done was done with
concurrence as a member of the Outtrim branch
committee. I therefore return to the considerati
question as to whether the facts and inferences bef
entitle the plaintiff to recover from the defendants
Gray, Wilson, McEwan, and Kirby.

The inferences I draw establish a conspiracy be
defendants and others to coerce the mine-owners t
employ the plaintiff, and to refuse to further emplo
to coerce such mine-owners by procuring an unlawful
contract by all the members of the Outtrim branch e
the mine; that acting on such conspiracy they did
means, accomplish their object—the plaintiff's empl
the mine is at an end. Now, notwithstanding recen
and multitudinous conflicting dicta, it is still, I thi
clear that it is criminal for a number of persons to agre
"to do an illegal thing—that is, to effect an unlawful
to effect, by unlawful means, a lawful purpose": (
Case (*e*).

Now, assuming (which I am by no means prepared
that the something the defendants wanted to effect w
they agreed to attain that end by unlawful means, n
procuring a breach of a number of contracts made
mine-owners. That conduct makes the defendants in
guilty of a criminal conspiracy: *Mulcahy* v. *The Q*
Mogul Steamship Co. v. *McGregor* (*g*). And as tha

(*e*) [1844] 11 Cl. & F. 155. (*f*) [1868] L.R. 3 H.L.
(*g*) 23 Q.B.D. 598, at p. 624.

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has resulted in damage to the plaintiff, it is actionable: *v. Leathem* (*h*). The same conclusion may be reached the proposition enunciated by Lord Lindley as the of the decision in *Lumley* v. *Gye* (*i*). His Lordship *uinn* v. *Leathem* (*k*))—"The principle which underlies sion reaches all wrongful acts done intentionally to a particular individual, and actually damaging him." ase the "wrongful acts" were the breaches of contract ed and procured; the breaches were intentionally l and intentionally committed. And they were inten- procured and committed to damage the plaintiff, and did damage him. It seems to me that the plaintiff's right ed may also be established through the law as stated by atson in *Allen* v. *Flood* (*l*). Lord Watson says:— are, in my opinion, two grounds only upon which a who procures the act of another can be made legally ble for its consequences. . . . In the second place, e act induced is within the right of the immediate actor, herefore not wrongful in so far as he is concerned, it be to the detriment of a third party; and in that case, g to the law laid down by the majority in *Lumley* v. the inducer may be held liable if he can be shown to ocured his object by the use of illegal means directed that third party." In the case under consideration the nts (the inducers) are shown to have procured their he termination of the plaintiff's employment in the mine) se of illegal means (breaches of contract) directed against rd party (the plaintiff). I am therefore of opinion that ntiff is entitled to succeed; that the appeal should be with costs, and that the judgment below should be set nd judgment entered for him for 100*l.* with costs.

D, J., read the following judgment:—According to *Quinn em* (*m*) the decision in *Allen* v. *Flood* (*n*) was confined y narrow point, which has no application to the present here conspiracy and coercion were expressly excluded

901] A.C. 495, at p. 510.
E. & B. 216.
901] A.C. 495, at p. 535.
(*l*) [1898] A.C. 1, at p. 96.
(*m*) [1901] A.C. 495.
(*n*) [1898] A.C. 1.

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from consideration. Here, as in *Quinn* v. *Leathem*, the
the very essence. This distinction must be borne in
dealing with the judgments in those authorities, and i
mining how far they apply. Remembering this, I think
can get little or no help from *Allen* v. *Flood*; but that
look to *Quinn* v. *Leathem* and the *Mogul Case* (*o*) for gu

The principle, or one of the principles, upon whi
decisions were founded, is that a combination to hurt an
his trade or business, without just cause or excuse, is u
but that a desire to advance or protect one's own intere
at the expense of another, affords an excuse, althoug
event can a combination to so hurt another be la
unlawful means are adopted. This seems based upon
some rule, and enables all men by union to defend the
while it prevents injustice, oppression and tyranny.

The only question, therefore, we have to determin
far this principle applies to the defendants. They unde
did combine. They also clearly intended to damage,
damage, the plaintiff in his trade. Had they then
cause or excuse? Were they acting wrongfully and mal
with intent to injure the plaintiff, or were they i
legitimately to advance their own interests, and d
use lawful means? The answer to this depends
view taken of the evidence. The learned primary
was favourable to the defendants, but I think that
unduly impressed by the case of *Allen* v. *Flood* (*p*), a
in addition, too limited a view of the meaning of the ju
in *Quinn* v. *Leathem* (*q*). He has not placed the same
upon the effect of combination as I do, nor has he e
any opinion as to the unlawfulness of the acts
defendants. For these reasons, I feel at liberty to d
own conclusion on the facts, and I can see no possible re
that the defendants are liable. They, with others, combi
agreed to threaten damage to the Outtrim Company u
company would do something which it was not boun
and did not wish to do—viz., dismiss the plaintiff. Th

(*o*) 23 Q.B.D. 598; [1892] A.C. 25. (*p*) [1898] A.C. 1.
(*q*) [1901] A.C. 495.

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h the defendants proposed to hurt the company was ike, and this they threatened, and they had the carry their threat into execution. The strike was effect *instanter* at the end of seven days, which under was a breach of contract on the part of the strikers, object of the defendants was to drive away the plaintiff, object they attained. So that the defendants caused o the plaintiff by an injurious conspiracy, carried out ful means, and such conduct is clearly actionable, as t only a combination in pursuit of a malicious purpose another, but also an agreement to effect such purpose proper act, viz., by breaking their own contracts. The ts were not seeking any direct benefit for themselves. ere upholding what they considered the principles of , and were punishing the plaintiff as an alleged violator principles. Such an object does not, in my opinion, y just cause or excuse for a combination to coerce an r into refusing to employ a workman by a threat of an l strike, even if there could be any excuse for such It was said that the threat used was to strike by e agreed fourteen days' notice. Whether or not such a nder such circumstances would give a cause of action I discuss, because the evidence, to my mind, is conclusive r way. The witnesses McKenzie and Butler, for the show that the defendants were intending to stop work d of the seven days if plaintiff were not dismissed. This med by witnesses for the defendants. Wilson says that Monday he anticipated a strike. McEwan states that informed McKenzie "that within seven days from that men would cease to work" with plaintiff. Gregory's s that he informed the manager "that after seven days not intend to work" with plaintiff, and Kirby says lly the same thing, while exhibit 4 is to the same effect. r, the men did strike on the eighth day as soon as they at the plaintiff had not been dismissed. It was further hat, even if this were so, the defendants had just cause king, because, according to some of the evidence, they to Martell as he might help in some way to reduce

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their wages. Even if this were so it would not ju
unlawful strike. But I think, in face of the whol
evidence and correspondence and general surrounding
case, that this view is utterly incredible, and I do not
sign of its acceptance by the primary Judge.

It was then contended that the plaintiff's particula
cover the case of an unlawful strike. The particulars
ambiguous, but they certainly include every kind of st
no objection was taken to the evidence on this groun
trial. In my opinion, therefore, the conduct of the de
was actionable within the decisions to which I have ref

It was further urged that the acts of the defendant
bring about the dismissal of the plaintiff, and that th
by the company to subsequently employ the plaintiff
from the previous threats, but from a dread of a r
But, even so, that dread was created by the previous th
was so connected with it as to form part and parcel of
transaction. What the defendants aimed at was the p
removal of the plaintiff from the mine, and they achi
object by coercing his employer. Coercion, at all eve
exercised in combination, is just as illegal when used t
employment as it is when used to interfere with a co
relation (*r*), and I think, therefore, that the dread cr
the defendants' threat was coercion, which preve
re-employment of the plaintiff, and thereby cau
damage.

I see no difference in the liability of the defendan
the Court. They were all parties to the agreement, a
equally responsible. I therefore concur in the judgme
Court.

Appeal allowed. Judgment for
for 100*l.*, *with costs as ag*
individual respondents.
dismissed without costs as
the other respondent.

Solicitor for the plaintiff: *Derham.*
Solicitor for the defendants: *Dillon.*

(*r*) [1901] A.C. 495, at pp. 510, 540.

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In re INCOME TAX ACTS (No. 2).

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December 1, 9.

x Act 1896 (*No.* 1467), *s.* 12—*Income Tax Act* 1903 (*No.* 1819), *s.* 9 (2)
ncome—Dividends on shares in company—Liability of beneficiary.

arising from dividends on shares in a company registered under Part
Companies Act 1890, and not carrying on mining operations in
not taxable under the *Income Tax Acts*, either in the hands of the
of beneficiaries.

IAL CASE.

was a case stated by the Commissioner of Taxes under
isions of the *Income Tax Act* 1896, and referred to the
rt by Hood, J.

peared *inter alia* that a testator devised and be-
real and personal property to trustees upon trust for
on and investment in specified investments including
es of a certain named company, and out of the
produce to pay to his wife an annuity of 1200*l.*,
quarterly, and free from all deductions for probate or
r duty on remittance or other charges. He directed his
to apply the surplus of the yearly produce, or such part
thought fit, in payment among his children, and to
ate the surplus after such payment until the period of
ion. He also directed his trustees at the expiration of
period to divide the *corpus* in certain proportions
is children. Probate of the will was, in 1899, granted
ecutrix, the widow of the testator, and to two executors,
. Pursuant to provisions of the *Income Tax Acts*, X.,
f the trustees of the trust estate of the testator, for-
o the Commissioner of Taxes a return of the income of
e for the year ending 31st December 1902. Accompany-
return was a statement showing the sources from which
ne of the trust estate was derived, and how the income
t with by the said trustee. It contained the following
t:—

" RECEIPTS.

vidends from —— Co. Ltd. ...	£7,751	8	0
vidends from —— Co. Ltd. ...	3	17	6
terest on outstanding purchase-money	135	0	0
	£7,890	5	6

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"DISBURSEMENTS.

"Testator's widow	£1,200	(
"K. B. (son of testator)	350	(
"Balance for accumulation and investment	3,753	1

The companies referred to in the statement v
registered under Part II. of the *Companies Act* 1890
not carry on mining operations in Victoria.

The Commissioner of Taxes thereupon in 1903
assessment upon X., as such trustee, for the year con
January 1903, in respect of the sum of 3753*l.* 19*s.* 3
taxable amount of income derived from produce of prop
undistributed by the said trustee.

X., the trustee, objected to the said assessment, on th
that the said sum of 3753*l.* 19*s.* 3*d.* consisted of divide
companies not registered under Part II. of the *Compa*
1890, not carrying on mining operations in Victo
was therefore exempt from tax under sec. 9 (2) of Act

The widow of the testator forwarded a return of in
the year ended December 1902, and such return includ
alia, the annuity of 1200*l.* received by her from the tr
the said estate.

The Commissioner of Taxes thereupon made an as
upon the widow in respect of the sum of 1450*l.*, which
the said annuity of 1200*l.* as the taxable amount of he
from produce of property.

The widow objected to the assessment, on the gro
the sum of 1450*l.* should be reduced by 1200*l.*, inasmu
said sum of 1200*l.* received by her as a beneficiary u
said will was income derived by the trustee from th
mentioned in the statement.

The Commissioner made a similar assessment upon
made by K.B., a son of the testator, in respect of the sum
who made a similar objection to that lodged by the wid

The questions for the opinion of the Court were:—

(1.) Is the said X., as trustee as aforesaid, liable u
said assessment to pay income tax in respect of the sai
3753*l.*, or of any and what part thereof?

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s the said widow liable to pay income tax in respect of
total sum of 1450*l.*, and if not, by what amount should
sum be reduced?
s the son liable to pay income tax in respect of the said
50*l.*?

or the Commissioner of Taxes—This is an accumulation
t, a balance of income for accumulation, and the tax is
upon that. It is not protected by the new scheme of
Act No. 1819, and is still taxable under sec. 12 of Act
. The dividends belong to the beneficiaries, and they
yers. The Court is not concerned with the sources
which the income has come; it has to see that the tax-
o gets that income pays a tax upon that income. If
tor in his lifetime had covenanted to pay his wife the
m of 1200*l.*, then, although the source from which that
as obtained was dividends on shares in a company,
mpany had already paid the tax upon the dividends
istributing them, still the wife would have had to
upon her income as she received it. It makes no
e that the income at present comes through the hands
es; they are in the same position as the testator
ave been if he had been alive; their hands distribute
ne instead of his.
sel referred to *In re Income Tax Acts* (No. 1) (*a*).
Court intimated that, so far as the trustee was concerned,
not liable except as to the sum of 135*l.*]

t for the taxpayer—*The Income Tax Acts* tax indi-
not estates: *In re Income Tax Acts* (No. 3) (*b*); *In*
ne Tax Acts (No. 6) (*c*). By sec. 9 (2) of Act No. 1819
vided that "in the assessment of the income of any
liable to tax there shall not be included any dividends
company except a company registered under Part II.
mpanies Act 1890 and carrying on mining operations
ria." The widow is the "taxpayer." It is not the

A.L.R 261. (*b*) [1900] 25 V.L.R. 554.
(*c*) [1898] 23 V.L.R. 578.

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trustee who is the taxpayer, except under certain circu
which do not arise here. This 1200*l.* is clearly "dividen
a company within the meaning of the section, and th
dends have already been subjected to income tax in the
the company. It is true that the money has passed
the hands of a trustee, but that does not alter its
or its taxability. The scheme of the Acts is to ta
once, and once only, in the course of its reaching its
ultimate destination. The income of the beneficiaries
entirely of dividends, and if such dividends had b
directly to the widow by the company at the directio
trustees they could not again have been liable to th
imposition of the tax.

Box in reply—Once the money gets into the hand
trustee it loses its original character, and the source fr
it was derived cannot be looked at. It is simply, then,
money handed by the trustee to a beneficiary as income

Cur. adv

A'BECKETT, J., read the following judgment:—T
special case stating questions arising under Act No. 18
provided that, instead of the former mode of taxing
from companies under which a shareholder returned
as part of his income, the companies were to pay incom
of their profits, and the shareholders were not to
dividends as part of their income. The clause which
the latter purpose was sub-sec. 2 of sec. 9, which says—
assessment of the income of any taxpayer liable to t
shall not be included any dividends from any company.

We have here to deal with the case of a trustee admi
the estate of a testator, and, with an insignificant excep
whole income arises from dividends in companies. To
our judgment, we shall first deal with the case as if t
no exception. The duty of the trustee under the w
make certain fixed payments to annuitants, and to
residue of the income for persons whose interests ar
present ascertained, and this residue is represented in th

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as been furnished to the Commissioner as "balance for ation and investment 3377*l.* 13*s.* 11*d.*" The questions by the case relate to this balance and to two of these s, one of 1200*l.* and another of 350*l.* The Commissioner s income tax on each of these amounts. The taxpayer instance declines to pay, relying on sub-sec. 2 before ed. The object of this sub-sec. was obviously to exempt sons receiving the dividends from the tax which had eady levied on the fund out of which the dividends were o prevent a double exaction. In the case before us the ds are received in the first instance by the trustee, but he beneficial interest in them; he has merely to deal with r the purpose of paying them over to other people. ng to the system of taxation applicable to trustees, e receiving income from property subject to taxation ot himself pay the tax unless in the case of a ary unascertained or under disability. His return the persons who receive the net income available stribution, and what they receive from him part of the whole of the income on which they tax. Where the beneficiaries are unascertained, and me is kept in hand, the trustee pays the tax for these tained persons. There is no double taxation. The of the estate is not first taxed as a whole and then in ions of income paid out to beneficiaries. The tax falls l exclusively upon the beneficiaries, and is paid by them. ase before us, if the income had consisted of ordinary uch as rents and interest from mortgages, the tax would en properly levied in the three instances now before us— rustee as representing unascertained beneficiaries in the e, and on the beneficiaries in the second and third. As, r, the income consists of dividends in companies under 2, they are not to be included in the assessment. As to ividends, the trustee is not the taxpayer liable to tax the meaning of the sub-section; he merely points out the who are to be liable to tax. The exemption is not by him, nor would it be of any benefit to him; it is firstly and exclusively by the beneficiaries. In the case

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of the residue, though the trustee would have had
there were no exemption, he would do so on behalf
ficiaries, and in their place he is entitled to the exempti
if they were ascertained persons, they would claim
selves. The contention for the Commissioner re
intended exemption to a nullity. The contention fo
payer involves no twofold exemption. It allows
once only to the persons who, if their income came f
sources, would have to pay tax upon it. We hold th
is not payable in any of the three cases.

As to the admixture of taxable income, we think
proper way of dealing with it is to ascertain its relativ
tion to the income derived from dividends, and to asc
this process how much in the pound of the net incon
be attributed to this source. That proportion would b
if it came above the taxable minimum. The amount
trifling that the calculation may not be worth maki
admixture of taxable income may create difficulties
cases which do not exist here, but the principle of el
the exempted income would be the same in all cases.
judgment for the taxpayer, with costs.

HOOD, J., read the following judgment:—I agree w
has been said by my brother A'Beckett. The taxati
these Acts is a purely personal one imposed upon "th
derived by any person"—every person being liable t
respect of income: Secs. 5 and 8 of No. 1374. It is
inaccurate, in this connection, to speak of the incon
estate, or of the trustee thereof, because the income belon
beneficiaries. If the income is payable at once to the be
the tax on that income is paid by the person who deriv
the beneficiary. If, however, the beneficiary is not
entitled to receive his income, the tax is payable by the
Sec. 12 of Act No. 1467. But still, in this latter case
is on the income of the beneficiary, and if for any rea
income is not taxable, then no one pays. By sec. 9, of
1819, dividends from certain companies are not to be
in the assessment of income of any taxpayer. If, there

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received by a trustee are dividends, it follows, in my
that no tax is payable either by the beneficiary who
received his income, or by the trustee on behalf of the
not presently entitled. The income is that of the
ries. It is derived from dividends. Those dividends
eady been diminished by the tax having been paid by
pany out of the profits (sec. 9 of No. 1819), and so, by
section, they are exempt from any further taxation in
s of the person whose income they are.

present case is somewhat complicated by the fact that
these beneficiaries receive a fixed amount, and so the
lly thrown upon those entitled to the residue. But that
er between the beneficiaries themselves, and ought not
the Crown, which has already received the tax upon this
ome. There is also, I think, a clear distinction between
ent case and that suggested of a man receiving dividends
elf and then paying over all or a portion to another as
er's income. There would be then two taxations, as
uld be two persons receiving two incomes. Here there
e one income, and consequently but the one tax. It
that there is some difficulty, owing to the different rates
e derived from personal exertion and on income from
. As against that, the shareholder pays a much higher
ough the company, than in most cases he would have to
were directly liable on the dividends actually received,
s probable that the one was set off against the other.
any event, this consideration would not alter what I
is the true meaning of these Acts.

ES, J. I desire to add a few words. I have felt during
se of the argument very great doubt as to whether
ax should not be paid in respect of those two sums of
d 350*l*. I cannot say that that doubt is yet entirely
. I may put my difficulty very briefly. It seems to me that
come Tax Acts are Acts designed to tax individuals in
f incomes, and perhaps if there is one note more dominant
y other in the Acts it is this, that every person who
income over a certain amount should pay income tax

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F.C.

1903

In re INCOME TAX ACTS (No. 2).

Hodges, J.

on that income. It seems to me that under the instrum
which these two sums of 1200*l.* and 350*l.* are to be paid
an income of each such amount coming to the r
beneficiaries, and that neither has paid any income
respect of that income so received in fact by each. A
there is in some respects a distinction between the
this case and the case where a testator who might l
has covenanted to pay a certain sum, the difference
seem to me to be sufficient to make the tax payable in
case and not in the other. I take it to be clear tha
testator were living, and were under covenant to p
persons 1200*l.* and 350*l.* annually that they would have
tax upon such sums. The fact that it comes from a
instead of from the hands of the testator does not a
me to be sufficient reason for distinguishing one case f
other. The persons receive these incomes. It appear
that that is the difficulty, because such incomes as inc
not seem to be taxed. The document is not a conve
these persons of the dividends on these shares. The
ance is to a trustee of the whole of this property, and
to pay so much to these persons whether they are c
or whatever they are. That is the difficulty that has
my mind, and it has not been quite removed; but I do
strong enough upon the point to differ from the judgme
brothers.

Solicitor for Commissioner of Taxes: *Guinness*
Solicitor.

Solicitors for taxpayer: *Madden & Butler.*

W.

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CHRISTIE *v.* AH FOO.

F.C.
1904
March 9.

ation Restriction Act 1901 (*Commonwealth*)—*No.* 17 *of* 1901—*S.* 3 (*a*)—
Dictation by officer of passage of fifty words.

3 (*a*) of Act No. 17 of 1901 it is provided "that any person who when
o so by an officer fails to write out at dictation and sign in the presence
cer a passage of fifty words in length in an European language directed
cer" is a prohibited immigrant.
that in order to obtain a conviction under this section it is essential
sage of fifty words, neither more nor less, should be dictated; and that
officer stopped after reading ten words out, being satisfied that the
did not understand what was being read to him, and had not
to write any of the ten words so dictated, no offence was committed.

IAL CASE stated by Chairman of General Sessions and
by Madden, C.J., to the Full Court.
case consisted of a copy of the notes taken by the Chair-
General Sessions. The conviction was affirmed at General
. The following is a summary of the notes:—Ah Foo
rged with being on the 26th day of January 1903 a
ed immigrant who when asked to do so by an officer
write at dictation and sign in the presence of the officer
ge of fifty words in length in an European language
by the officer. The Court of Petty Sessions convicted
endant. Upon the appeal the following objections were
—

hat there was no evidence that the defendant was asked
ficer to write out at dictation, and sign in the presence
fficer, a passage of fifty words in an European language
by the officer.
hat the evidence showed that the defendant was not
y an officer to write out at dictation, and sign in the
of the officer, a passage of fifty words in an European
e directed by the officer.
hat Ah Foo was not properly informed as to the law, or
s was a test, and that he must satisfy it, or else could
l.
hat English is not an European language.
following evidence was given:—
-waiter Brown said—"I boarded the *s.s. Kumano Maru,*

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v.
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and found nine Chinamen passengers. I rejected tw
Hop and Ah Foo. I gave to Ah Foo a lead-pencil, a
piece of paper on the table, and told him to write wha
going to dictate. I dictated about ten words of Englisl
He stared at me, and did not write. An interpret
Soong, was with me. I directed Sam Soong to interp
I said, and he did. I then rejected Ah Foo."

David Sam Soong, Chinese missionary, stated that
the Chinaman, and in Chinese asked him if he cou
English, and was answered in the negative, and he th
if he could write English, and the answer was "No.
then Brown gave him a piece of paper to write,
defendant said that he could not write. Brown read
of paper, and Soong said the Customs House wanted
write the words read, and he said he could not. The co
was affirmed.

There were no findings of fact set out in the case.

The case came on for argument before Madden, C.J.,
referred to the Full Court.

Mann (*Eagleson* with him) for the informant.

Isaacs, K.C. (with him *Dethridge*) for the responden

Counsel for the respondent was not called upon.

MADDEN, C.J., delivered the judgment of th
[MADDEN, C.J., HODGES and HOOD, JJ.] We are of
that this conviction should be quashed. It is s
that, in dealing with an Act of Parliament which requ
nice administration, under any circumstances, one woul
the plain direction of the Statute, so far as it is plai
seems not to be so in all respects—should be wholly dis
It seems as if the Statute had never been read by the
its meaning gathered by him. Instead of bearing in
precise words of the Act, he takes upon himself to do s
which the Legislature never warranted anybody to do.
be remembered that this is a criminal prosecution, which
the accused as a prohibited immigrant, that he was "
who when asked to do so by an officer failed to writ

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n, and sign in the presence of the officer a passage of
ords in an European language directed by the officer."
re, those who prosecute for this offence are bound to
according to the principles of criminal cases. If it were
case it would be possible for this person to waive many
and relieve the officer from pursuing his duty. He might
cannot do it," or "It is no use bothering further."
e officer is bound to follow the Statute, whatever the
ed person may have to say in respect of it. The Statute
he officer to do this—"Any person who when asked to
an officer fails to write out at dictation and sign in the
of the officer a passage of fifty words in length in an
n language directed by the officer." Now, whatever is
aning of those last words, "in an European language
by the officer," it is plain that the officer is to dictate a
of fifty words in length in a language which, in this
, let it be supposed, was English. He is not at liberty to
n words of a passage, and say—"This man glares at me
any speculation in his eye. He does not satisfy me
likely examinee, and I will therefore stop." He must
. He is to select a continued and coherent passage of
icular language, and he is then to dictate to the extent
words. If he does not do that, there is no offence what-
the man as regards this charge, whatever charge might,
r sections of the Statute, be laid against him. The
here is, he is alleged as having failed to write out a
of fifty words; but the section is not satisfied by his
o write out ten words. In the present case, there is no
that any passage was ever dictated to this man. It is
the officer that "about ten words" were read in English.
ords might be no passage at all. They might be isolated
ut of a dictionary, with no sense of a passage according
section. We think, according to the evidence here, that
ntial constituents of the offence have certainly not been
We think the whole thing fails, on the admission of
er that when he had read out ten words he stopped.
gislature does not leave it to the officer to say what it
ise to him to do. His duty is to select a passage of fifty

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words, and read them, and ask him to write them, and
name; no more, no less. If he does not do that, the cri
not be constituted. The conviction will be quashed.
no authority to deal with costs.

Conviction qua

Solicitor for informant: *Guinness*, Crown Solicitor.
Solicitors for defendant: *Maddock & Jamieson.*

W.

F.C.
1904
March 10.

OGIER *v.* NORTON.

Costs—Solicitor conducting his own litigation—Taxation.

Where a solicitor himself conducts his own litigation, he is entitled in his bill of costs profit costs as such solicitor, although prior to the ment of the litigation he was not holding himself out as a solicitor or as one.

APPEAL from decision of Hood, J.

The plaintiff, J. C. H. Ogier, brought an action against the defendant, John Norton, and recovered dama the taxation of the plaintiff's bill of costs the taxin disallowed certain items, and upon a summons to taxation taken out by the plaintiff it was held that th officer was wrong in disallowing the items.

It appeared that the plaintiff conducted the major p the proceedings himself, without employing a solicit plaintiff in his affidavit stated that he was a barrister a tor. The affidavit filed on behalf of the defendant stated writ served on the defendant had the word "solicitor ordinarily appears at the foot of the writ, erased; th the proceedings the plaintiff described himself as a barri that he had never practised or held himself out as a and was a member of an association of counsel, the me which do not practise as solicitors. That the plaintif office. The bill of costs rendered by the plaintiff c many items which he claimed to be entitled to as a these items the taxing officer disallowed, and gave the f reasons:—"All the plaintiff's objections relate to costs by the plaintiff, who is a barrister and solicitor of the

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The writ was issued on 13th December 1902 by the in person, not as a barrister or solicitor, and up to May hen Messrs. Williams and Matthews became his solicitors ecord, the plaintiff did all the work in connection with and the plaintiff now claims to be allowed such charges ould be entitled to if he were the solicitor upon the cting for himself." The plaintiff took out a summons to he taxation, and the matter came on for hearing before The case of *Wright* v. *Trenchard* (*a*) was cited, in Iadden, C.J., had decided that a solicitor conducting his e was entitled to such costs, and His Honor, following tice thus laid down, allowed the summons, and referred of costs back to the taxing officer with the intimation h costs should be allowed. Leave to appeal from this as given. There were other items involved which are tly referred to in the judgment.

ke for the appellant—A solicitor litigant conducting his e has undoubtedly been allowed profit costs. This is, , a rule of practice, not a rule of law, and there must be ns to this rule of practice. If, for instance, a man who e a solicitor, but who has long ceased to practise, and leed, might be practising another profession at the time ing an action, were to be allowed profit costs because he e been a solicitor, the rule would be ridiculous. The practice was founded on the supposition that the solicitor business and having to give up his time to the litigation utilizing the work of his own clerks, was entitled to be l for his loss of time. That reason fails where, as in the case the plaintiff never did practice as a solicitor, and hold himself out as a solicitor; he has not lost his time citor, because he was not practising, nor has he taken up of a clerk, because he never had one.

nsel referred to the following cases:—*Wright* v. *rd* (*a*); *London Scottish Benefit Society* v. *Chorley* (*b*).

lerson for the respondent—The cases cited show clearly

895] 1 A.L.R. 22. (*b*) [1884] 13 Q.B.D. 872.

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the existence of the right of a solicitor conducting litigation to charge profit costs. That rule of pract acknowledged, the facts in this case show a plain admittedly is a solicitor, conducting his own litigat Court cannot investigate each case and see what pra attorney is doing, how much or how little. It v impossible to lay down a rule which was to be sub variation according to the extent of the solicitor's prac a fact, as soon as the solicitor starts his litigation, even not been practising before, he may be taken to have co practice. The authorities were all considered in th *Pennington* v. *Russell* (*c*), and the rule was laid do fullest extent, and clearly covers the present case.

Counsel referred to the following cases:—*Gugy* v. *Br* *In re West* (*e*); *Fields* v. *Lewin* (*f*).

MADDEN, C.J. The point involved in this appeal i from doubt, and it is not easy even now to find the full tion of the established principle on this point. The cases, and text-book writers, all put it thus, that on qualified to be a solicitor or attorney, and who con own litigation, is entitled to have the costs of that including profit costs for his time, when he is succes course there are exceptions to the costs to be allowed. For it would be absurd to allow him costs for instructing for attendances on himself, and things of that kin would involve a duplication of himself as client solicitor. With that exception, the English authoriti consistent with the view that a solicitor who is a himself in his own litigation is entitled to profit costs, too whether he be or be not practising, generally spe his profession. At first sight this may suggest a aspect. It might be said that it is clear that a lay appears in person is not allowed profit costs, although his time in the litigation; and the question is put wh there be any exception in the case of a solicitor wh

(*c*) [1883] 4 N.S.W. L.R. (Eq.) 41.
(*d*) [1866] L.R. 1 P.C. 411.
(*e*) [1850] 14 Jur. 997.
(*f*) [1791] 4 T.R. 275.

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in the same way? There cannot be any purpose in ng the solicitor as against a member of the public. A has a privilege in some things, but it is asked why ne have any privilege in his own litigation? The cases suggest the answer that if a solicitor, whether he ising generally or not, be a litigant, if he instructs a to act for him, that solicitor will be entitled to a con- larger sum for costs against the other side if successful solicitor who is acting for himself in his own litiga- ıld be entitled to. The cases put it on the ground that, whole, to permit this so-called privilege is to give an ge to the other side, because otherwise he would always another solicitor, and he would thus get an increased of costs. We think, then, the decision given by ırt in New South Wales, which considers all the authorities, points directly to the same conclusion. itely states that a solicitor who appears in Court, o is qualified, whether practising or not, is entitled his profit costs in his own litigation if he appears elf. That case brings to a distinct definition the pro- which had not been so distinctly defined by the English es, and it also applies the same principle which was to be stated by the English cases. In the present case nce shows that, although the plaintiff was entitled to act itor, he never did so act, and that he was a member of legal association, a body the members of which practise ters only, and not as solicitors. But there is no reason ough up to a certain point a practitioner has renounced ssion of a solicitor, he should not go back and begin he is entitled to do at any time, and he may begin his own case. We think, therefore, that the English ès, explained by the decision of the Court of New Vales, make it clear that a solicitor litigant has this e over other litigants, in that he can charge and get ofit costs, and as I have said before, his getting these cludes the increased disadvantage to the other side ould accrue if he were employing another solicitor.

ase which was cited to the Judge in the Court below

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was *Wright* v. *Trenchard*, decided by myself. That
appear to accord with the authorities now cited.

Other questions are presented to us dealing wi
items in the bill of costs. The first is an item "I
for brief;" that work consists in getting togeth
facts and information which would enable counse
the brief to understand and conduct the case at the tri
think that that is precisely the class of work which
would have been the proper person to do. He wou
to collate the facts and extract the relevant from the
and present the whole of the evidence to counsel, a
essentially a matter which a solicitor should do.
many things in which the solicitor must depend
information of the client, and this is work which h
himself, so as to get the case in a concise, logical, and
form. We think the Judge was correct in allowing t
be charged in some degree, at all events, and he
referred it back to the taxing officer, and the taxing
allowed it. The next item was "time spent in obtai
instructions, amounting to at least 20 hours, 6*l.* 13*s.*
information that was gathered by this labour was i
necessary to get for the proper answer to interrogato
had been put to the plaintiff. Now, supposing he had a
another solicitor, that solicitor could not have ans
questions without going to the client, at any rate as
the information. It is also a class of thing as to which t
would be the proper person and critic as to the i
appropriate to the answers. The solicitor would have
client to get the information for him. So when t
solicitor appears for himself he does this work, not
but as client, and therefore we think this item
disallowed. (His Honor then dealt with certain o
which involved charges for work rendered necessa
plaintiff's own insufficient answers and affidavits i
instance, and it was held that it would be unfair to
defendant pay for amendments made owing to the n
the plaintiff. These items were disallowed.)

A'BECKETT, J. I concur.

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, J. I desire to say that upon reason only, and apart
orities, I should have thought that an attorney
his own litigation was precisely in the same position
er citizen conducting litigation, neither better nor
t the English authorities make it clear that the
in some respects in a better position in conducting
igation than the ordinary citizen, and we are bound
those authorities.

Order accordingly.

rs for the appellant: *Marshall Lyle.*
rs for the respondent: *Williams & Matthews.*

W. H. M.

MORONEY *v.* ROUGHAN.

HODGES, J.
1903
November 28, 29, 30.

urchaser—Contract for sale of land—Payment by instalments—Time e of the contract—Partial failure to perform—Right to rescind—ion" and "Condition"—Condition precedent.

by one party of one of the conditions of a contract, although a or its performance, and although the contract provides that time essence of the contract, does not of itself justify the other party in ontract as at an end.

one party in considering the contract has been entirely determined of a condition, the party guilty of the breach must have shown an intention to repudiate, and the existence of that intention must n examination of all the circumstances of the case.

ntract for the sale of land provided for the payment of the purchase rly instalments, and it was further provided that time should be of the contract,

the failure to pay one instalment upon the fixed day was not in ve of the intention of the purchaser to repudiate.

statement of claim in this action the plaintiff Moroney
–(*a*) an order that the defendant Roughan should
possession of certain land and premises, and claimed—
r mesne profits; (*c*) 100*l.* damages; (*d*) a declaration
ntract therein referred to was duly rescinded and put
y the plaintiff; and (*e*) a declaration that the sum of
ein referred to) paid by the defendant had been

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HODGES, J.
1903
MORONEY
v.
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forfeited to the plaintiff, or alternatively that the pla
entitled to retain possession of it.

The facts are fully set out in the judgment of Hodg

Weigall and Guest for the defendant referred t
Specific Performances, p. 465; *Re Dagenham Dock*
Grassmere Estate Co. v. *Illingworth* (*b*); *Barrow* v. *I*
Hacker v. *Australian Property, etc., Co.* (*d*).

Higgins, K.C., and *Duffy, K.C.*, for the plaintiff refe
Roscoe N. P. (15th ed.), 910, 919; *Doe* d. *Johnson* v. *Bo*
Dart on Vendors and Purchasers (6th ed.), 483; *I*
Berry (*f*); *Lucas* v. *Godwin* (*g*); *Noble* v. *Edwa*
Davis v. *Dougall* (*i*); *Barclay* v. *Messenger* (*k*);
Contracts (3rd ed.), at p. 567; *Bettini* v. *Gye* (*l*); *Tr*
Land Act 1890, Schedule 25; *Cornwall* v. *Henson* (*m*

Weigall (by permission) in reply referred to *Mersey*
Iron Co. v. *Naylor* (*n*).

The arguments sufficiently appear from the judgme

HODGES, J. By a contract dated 20th November
plaintiff agreed to sell to the defendant and the defe
purchase from the plaintiff some 716 acres of land at 5
acre. Under the heading "Conditions of Sale" the
stated to be 100*l.* cash on the signing of the contract,
1st March 1903, and thenceforward 500*l.* or more year
option of the purchaser. Interest at the rate of 4½
payable half-yearly, dating from 1st March 1903. The
to pay a rental of 4*s.* 6*d.* per acre for grazing only, dat
1st March 1902, and expiring on 1st March 1903, pays
yearly in advance. Possession to be given and take

(*a*) [1873] L.R. 8 Ch. 1022.
(*b*) [1889] 15 V.L.R. 687.
(*c*) [1891] 1 Q.B. 417, at p. 425.
(*d*) [1890] 16 V.L.R. 751.
(*e*) [1835] 3 A. & E. 188.
(*f*) [1853] 3 De G. M. & G. 284, at p. 291.
(*g*) [1838] 3 Bing. N.C. 737, at 744.
(*h*) [1877] 5 Ch. D. 378,
(*i*) [1889] 15 V.L R. 42
(*k*) [1874] 43 L.J. Ch. 4
(*l*) [1876] 1 Q.B.D. 183.
(*m*) [1900] 2 Ch. 298.
(*n*) [1884] 9 App. Cas. 438, 439.

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1902. After that follow the conditions, one of them
hat time shall be in all things and respects of the essence
contract, and then "The conditions of Table A of the
er of Land Act 1890 shall apply to this contract with and
to the conditions and modifications following." The
ash was paid by the defendant to the plaintiff. The
nt, under an arrangement with the plaintiff, went into
on earlier than the time fixed by the contract, and paid
mall sum in connection with that occupation. His
ion under the contract commenced on 1st March 1902,
duly paid the 4*s.* 6*d.* per acre for the occupation of the
rom 1st March 1902 to 1st March 1903. On 27th
y defendant, who, though an illiterate man and unable
e, appeared to be keeping in mind his contractual
ons, remembered that he had to pay to the plaintiff 900*l.*
March. Though apparently a man of substance, the
had been notoriously bad, and while, so far as I can see,
pay the 900*l.* if there was an absolute necessity, he
ed not to pay the whole on 1st March if the plaintiff
greeable. Accordingly, on 27th February he came from
ace where he had been with his sheep and saw the
f. So far as the facts are concerned the great trouble in
arises as to what took place on Friday, 27th February,
he plaintiff and defendant met at plaintiff's residence, and
following morning, defendant having stopped at plaintiff's
or the intervening night.

er much doubt and much consideration I have arrived at
clusion that the defendant's version is the correct one.
eet on the 27th. He says in substance that it was then
d that plaintiff should take 600*l.* cash, and the balance,
x months later. There was some question, the defendant
g to pay only 500*l.*, but the plaintiff intimated that he
0*l.* to pay to the auctioneers, and that he therefore wanted
nd the 300*l.* could stand over for six months. That was
angement made on Friday night. There was some further
ration as to when the 600*l.* should be paid. The next
s 28th February, and the day following, 1st March, was
ay. Strictly, the money was therefore payable on 28th

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HODGES, J.
1903
MORONEY v. ROUGHAN.

February. I do not know whether the parties kne whether they thought it was payable on the Monday ever they thought, they discussed the time as to when t should be paid. The plaintiff alleges that it was to be later than Tuesday; and that it was agreed that defen either to bring it then or to send it by post. The d says Thursday was the day for which he promised for I am disposed to adopt the defendant's story that the to be paid by him to the plaintiff on Thursday, the 4t (His Honor, after reviewing the evidence, arrived at the conclusions on the facts.) On the Thursday the d as I find, arrived at plaintiff's residence with a cheque and ten 5*l.* notes, ready, willing, and desirous to pay a up. The plaintiff then absolutely refused. On the according to the plaintiff's story, he went to Wangar went to the station on that day and on the Wednesday there were any letters for him. He then went to the Doig & Vallender and proposed a sale of the prem before 12 o'clock, as I understand it, the formal co executed by the purchaser and the auctioneer at a pr in excess of what defendant was willing to give.

That contract itself bears the impress of a certain a hurry, and it is altogether a somewhat curious tra this very rapid finding a purchaser and executing tract, and its vague and indefinite terms. The only element in it is that the provision that time should essence of the contract, which was supposed to be so the vendor's benefit, is struck out; otherwise the cont regards the provision for payment much more benefit. The facts being so, plaintiff now asks that should deliver up to him possession of the land and etc. (His Honor read the particulars of claim.) question of law has been so elaborately argued, I propo a few words upon it.

It is contended that inasmuch as time is of the e the contract, that therefore every provision in it which time for doing anything must be punctually performed matter how trivial the conditions, no matter how imm

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erest of either party, the mere fact that a time is fixed ely destroys the contract in the event of non-performance condition within that time, and puts the other party to ntract in the position of being able to repudiate all ons under it, and in effect to forfeit all that the other as paid under it. The contention is in fact this, that in ntract, if defendant had paid this 900*l.* and his first ent of 500*l.*, and so on until there remained only the posit of 500*l.* owing, and the defendant came five minutes he time that that last deposit was payable to pay it, ing he has paid is forfeited. Of course the parties may ract, but unless they show by clear language that they ntend, the Court will not be in a hurry to assume that they contract." Here the only provision to give the contract eaning is the provision—"Time shall be of the essence contract." A case was cited to me in the earlier part of gument—*Lucas* v. *Godwin* (*o*). That was a case in the plaintiff contracted to build cottages and complete y 10th October. They were not finished until the 15th. efendant was anxious to escape payment. It is to be bered that at law (and this is a case at law) time was of the essence of the contract. At p. 744, in delivering ent, the Lord Chief Justice says:—"If it be said that mpletion by 10th October is a condition precedent, at he objection should have been taken at the time. In ng the work done, the defendant admits that it is of some to him, and that the plaintiff is entitled to some eration. It is not a condition, but a stipulation, for non-ance of which the defendant may be entitled to recover es; but even if it be a condition, it does not go to the of the contract, and is no answer to the plaintiff's claim rk actually done." In the contract before me it appears that the stipulation as to time is a stipulation, not a con- and that even if it be a condition it does not go to the of the contract. I shall pass by the intermediate cases me to *Mersey Steel and Iron Co.* v. *Naylor* (*p*). I read rom the judgment of Lord Selborne, commencing at

(*o*) 3 Bing. N.C. 737. (*p*) 9 App. Cas. 434.

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HODGES, J.
1903
MORONEY v. ROUGHAN.

p. 438 :—" Upon the other point I do not think it des
lay down larger rules than the case may require or tha
authorities may have laid down for my guidance, or to
possible cases differing from the one with which we
deal. I am content to take the rule as stated
Coleridge in *Freeth* v. *Burr* (*q*), which is in substance, as
stand it, that you must look at the actual circumstanc
case in order to see whether the one party to the co
relieved from its future performance by the conduc
other—I may observe here that of course I am dealing
case apart from the condition of Table A of the *Transfer*
Act 1890—you must examine what that conduct is, so
whether it amounts to a renunciation, to an absolute r
perform the contract such as would amount to a resciss
had the power to rescind, and whether the other pa
accept it as a reason for not performing his part; and
that nothing more is necessary in the present case
look at the conduct of the parties and see whether
of that kind has taken place here." I may reiter
words, especially the last part of them—" I think that
more is necessary in the present case than to look at
duct of the parties and see whether anything of that
taken place here." I do not think it can be pretended
moment that the conduct of the defendant was su
indicate that he renounced the contract; that he a
refused to perform the contract; that his conduct woul
to rescission if he had power to do it. The Lord Chanc
on :—" Before doing so, however, I must say one or tw
in order to show why I cannot adopt Mr. Cohen's arg
far as it represented the payment by the respondents
iron delivered as in this case a condition preced
coming within the rules of law applicable to condition
dent. If it were so, of course there would be an end of
but to me it is plain beyond the possibility of controv
upon the proper construction of this contract it is
cannot be a condition precedent." Then " it is perfec
that no particular payment can be a condition preceder

(*q*) [1874] L.R. 9 C.P. 208.

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ontract, because the delivery under the contract was most y to precede payment; and that being so, I do not see ithout express words, it can possibly be made a condition nt to the subsequent fulfilment of the unfulfilled part of tract by delivery of the undelivered steel steamer." Then 3 Lord Blackburn says:—"The rule of law, as I always ood it, is that where there is a contract in which there parties, each side having to do something (it is so laid the notes to *Pordage* v. *Cole*) (*r*)—if you see that the to perform one part of it goes to the root of the contract, the foundation of the whole, it is a good defence to say ot going to perform my part of it when that which is t of the whole, and the substantial consideration for my ance, is defeated by your misconduct.' But Mr. Cohen led that whenever there was a breach of the contract at ink he hardly continued to contend that after a little —I cannot say that counsel were so modest here—"but he enever there was a breach of a material part of the con- t necessarily went to the root of the matter." That was ument in this case, that so long as there was a time fixed doing of an act, it went to the root of the matter. Then lackburn says—"I cannot agree with that at all." I think bservations are very pertinent to what has taken place here, re might be a doubt whether they apply to a case between and purchaser, and in that view the case of *Cornwall* v. (*s*) is conclusive. That was a case between vendor rchaser, in which there had been repudiation by the ser, or rather the question was whether the purchaser pudiated. Still remembering that I am dealing with it from this paragraph of the schedule, I look first at the ge of the Master of the Rolls. He says:—"Cozens J., has arrived at the conclusion of fact that in October he plaintiff had shown by his conduct that he had ated the contract, and that the defendant was justified in g this as an abandonment by the plaintiff of his rights the contract, and in acting thenceforward as the true of the property both at law and in equity. If I could

1 Wms. Saunders 548. (*s*) [1900] 2 Ch. 298.

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HODGES, J.

1903

MORONEY v. ROUGHAN.

concur in that conclusion of fact, I should think th judgment of the learned Judge was right, but, with the g respect to him, I cannot arrive at that conclusion." T exactly my position here. If I could arrive at that con of fact in this case, I should do what the Lord Chief says he would have done in that case. Being unable to at the conclusion that the defendant had shown by his c that he repudiated the contract, I am unable to do othe arrive at the conclusion arrived at by the Court of Ap that case. In the judgment of Lord Justice Collins, the Master of the Rolls, he uses language which refers to th which I have cited. He says:—"Whatever doubt as may have arisen from a comparison of such cases as *Wi Reynolds* (*t*) *Hoare* v. *Rennie* (*u*), *Honck* v. *Muller* (v *Simpson* v. *Crippin* (*w*), has been set at rest by *Merse and Iron Co.* v. *Naylor, Benzon & Co.* (*x*). The questi fully considered by the House of Lords in the latter ca the law is now clear that the breach of one stipulation d necessarily carry with it even an implication of an inten repudiate the whole contract. It may do so if the circum lead to such an inference; but the further the partie proceeded in the performance of the contract the less li it that by the breach of one stipulation by one pa should intend to declare his incapacity to perfor contract or his intention not to carry it out." His L in that case is applying the principles laid down House of Lords in the *Mersey Steel and Iron Co.'s* C the ordinary case of vendor and purchaser, and I think justified in this case in applying these principles too, determining that a breach of one of the terms of the co although there is a time fixed for its performance, does itself justify the other party in treating the contract as at Now I proceed to deal with another argument used plaintiff's counsel, which is based on the 6th clause of T This contract is on a printed form, which conte

(*t*) [1831] 2 B. & Ad. 882.
(*u*) [1859] 5 H. & N. 19.
(*v*) [1881] 7 Q.B.D. 92.
(*w*) [1872] L.R. 8 Q.B. 14.
(*x*) 9 App. Cas. 434.

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sory notes being given—that practically all the payments are not cash payments are to be secured by the giving of sory notes by the purchaser. The 6th clause of Table A. es:—"If the purchaser shall fail to comply with the above ons or shall not pay the whole of the deposit or shall not e acceptances or notes provided for by the contract, or ot duly pay the same or any of them, his deposit money, uch thereof as shall be paid, shall be actually forfeited to ndor, who shall be at liberty without notice to rescind the t and to resell the property." Now, that, so far as it to promissory notes, has no application whatever to this t, because there are no promissory notes existing. If the f relies on the clause, "if the purchaser shall fail to with the above conditions," the answer is that it does ly, because payment is no part of the "above conditions" contract. It is part of the terms of the contract, but is ssified among the conditions of the contract. It would een among the conditions if payment had been provided promissory notes, but as it is not clause 6 does not apply contract at all. I am therefore of opinion that the f has failed to make out his title to any relief whatever. failed to make out his title to damages, because, in my , the facts are against him. He has failed to make out im to any other relief, because both facts and law are him. There will be judgment for defendant, with costs.

Judgment for defendant.

citors for the plaintiff: *Gavan Duffy & King* (for).

citors for the defendant: *Croft & Rhoden* (for Hassett).

J. M.

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HOLROYD, J.

1903
October 15, 16.

HERMAN *and Another v.* THE MOUNT LYELL M AND RAILWAY COMPANY LIMITED *and Ano*

Assignment of debt—Equitable assignment—Letters—Promise by debtor to pay to assignee a future debt—Request by assignor to assignee to promise against his debt to assignee—Book Debts Act 1896 (No. 1424) *Applicability to foreign debts.*

V. Brandts Jones v Burdge & Co (H.L.) (1905) A.C. 454 21. T. L. R. 710.

The H. Company, which was domiciled and traded in Tasmania, and pressed by the E. Bank in Victoria for payment of its overdraft, sold the M. Company, which was incorporated in Victoria, but carried on b Tasmania, and on 22nd October 1902 the M. Company, at its request, to the E. Bank a letter to the following effect:—"We have received fr Company goods to the value of 1013*l.*, which sum we agree to place Bank in Melbourne to their credit on or before 1st April 1903 in thereof." On 23rd October 1902 this letter was forwarded by the H. Co the E. Bank, together with a letter of its own, asking the E. Bank t accept the letter of the M. Company against our account." Before t had been paid by the M. Company into the Bank the H. Company e deed of assignment in favour of creditors.

Held, that the two letters constituted a good equitable assignment o due by the M. Company to the H. Company, and that the E. Bank wa to the money in preference to the trustee under the deed of assignment

Held also, that the assignment did not require registration under *Debts Act* 1896, the Act not applying to debts owing by a foreign d foreign creditor.

HEARING before trial of questions of law raised pleadings under Order XXV., r. 2.

This was an action by Marks Herman and the Scottish, and Australian Bank Limited against the Mou Mining and Railway Company Limited and Horace Wootton.

The statement of claim was as follows:—

(1.) Thomas Whyte and Isaac Herman (hereinafte "the debtors") carried on business at Strahan, Tasm hardware merchants, under the name of "The H Company."

(2.) The debtors had an overdrawn account w plaintiff bank, which the plaintiff, Marks Herm guaranteed to the amount of 1000*l.*

(3.) The plaintiff bank having pressed for paymen amount overdrawn, the debtors sold goods to the de company in Tasmania for the price of 1013*l.* in order to

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f bank, and the defendant company, at the request of the
, and with the view of inducing the plaintiff bank to
from pressing the debtors for payment, agreed with the
f bank, on or about the 22nd October 1902, to place the
of the said price to the credit of the debtors at the
f bank on or before the 1st April 1903.

The defendant company, at the request of the debtors,
o the plaintiff bank from Tasmania on the 22nd October
letter which (so far as material) is as follows:—"We
eceived from the Mining Hardware Company, Strahan,
s per invoices amounting to 1013*l.*, and agree to place
m in the English, Scottish, and Australian Bank Limited,
rne, to their credit, on or before the 1st April 1903, in
t of same."

On the 23rd October 1902 the debtors forwarded the
ter to the plaintiff bank from Tasmania with a letter of
otors, stating:—"Herewith enclosed please find a letter
e Mount Lyell Mining and Railway Company Limited,
2nd inst., which please accept against our account."

Relying on the premises (as the defendant company
the plaintiff bank forbore from suing the debtors for
t.

On the 25th November 1902 the debtors executed a
ssigning all their real and personal property to the
nt Wootton on certain trusts.

On the 5th December 1902 the plaintiff bank gave to the
nt company a formal written notice of the said letter of
d October 1902.

In February 1903 the plaintiff Herman, on the demand
plaintiff bank under the guarantee, paid to the plaintiff
he 1000*l.* owing by him under the guarantee, and the
f bank handed over to him the said letters of the 22nd
d October 1902.

) The defendant company has failed and refused to pay
sum of 1013*l.* to the plaintiffs or to either of them.

) The defendant Wootton claims to be entitled to receive
sum from the defendant company by virtue of the said
assignment.

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HOLROYD, J.

1903

HERMAN
v.
THE
MOUNT LYELL
MINING AND
RAILWAY
COMPANY
LIMITED.

The plaintiffs claim:—A declaration that the said effectually assigned to the plaintiff bank, or that the became trustees of the said debt for the plaintiff ba order for payment of the sum of 1013*l.* with interest. addition or in the alternative) as against the defendant damages for breach of its agreement, 1200*l.*

The defendant Wootton, in his defence, admitted paragraphs, 1, 10, and 11 of the statement of claim, bu admit paragraphs 2, 6, 8, and 9. In paragraph 6 of th he admitted paragraph 7 of the statement of claim an said that upon the 2nd December 1902 he gave to the d company a formal written notice of the said trust deed graphs 10-12 of his defence were as follows:—

(10.) He will contend that neither of the alleged d set out in paragraphs 4 and 5 respectively was an assig the said sum of 1013*l.* to the plaintiffs or either of them

(11.) He will contend that, if such documents or them amounts to an assignment of such sum, such assig void and of no effect under the provisions of the *Bo Act* 1896 (59 Vict., No. 1424).

(12.) He will contend that, by reason of the facts paragraph 7 of the statement of claim and paragraph defence, he is entitled to the said sum of 1013*l.*

The plaintiffs' reply to this defence was—

(1.) They join issue and submit the questions of la thereby to the judgment of this honourable Court.

(2.) As to paragraph 11 thereof, they will object provisions of the Victorian Act of Parliament therein are not applicable to, and do not affect the validit assignment of a debt under the circumstances set ou statement of claim.

The defendant company did not plead, but took interpleader summons; and on 22nd June 1903 Hodges, an order thereon by consent that upon the defendant paying the sum of 1013*l.* into Court to abide the even action as between the plaintiffs and the defendant Woo action, so far as it made any claim against the defend pany, should be stayed until further order, and that th

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l against Wootton, without prejudice to the plaintiff's o proceed thereafter for damages against the defendant ny. On the 7th September 1903, by consent of the ffs and the defendant Wootton, an order was made by d, J., for the hearing before the trial of the points of law by paragraphs 10 and 11 of the defence.

sen (with him *Mitchell*) for the defendant Wootton—e letters of 22nd and 23rd October 1902 do not constitute uitable assignment. It is true that there need be no lar form of words for such an assignment, but the debt e made over either absolutely or on some condition that een fulfilled. If the letter of 22nd October had been to constitute an assignment, it would have been couched erent language. The words "I agree" to do something, ver used in a transfer of property. The letter is con-l merely, being an undertaking to pay a sum of money at e date to the credit of the Hardware Company. This was to be put possibly into the absolute control of the are Company. It depended entirely upon the condition ccounts, and on its arrangements with its bankers, as to vas to become of the money if the Mount Lyell Company at it, at most, had contracted to do. A mere mandate ot amount to an equitable assignment, because it may be l at any time before it is executed. *Cf. Rodick* v. *l* (*a*); *Ex parte South* (*b*); and *White and Tudor's g Cases* (6th ed.), vol. ii., p. 836.

The next question is whether this was a book debt sec. 2 of the *Book Debts Act* 1896; if so, it should have egistered under that Act. The Mount Lyell Company is rated in Victoria, and carries on all its administrative s at its head office there, but it must be admitted that all ve business is carried on in Tasmania. The Mining Hard-ompany carried on part of its business in Victoria, as its g operations show, still I cannot say that this was a an debt. The Mount Lyell Company could only have been

1851] 1 De G. M. & G. 763; (*b*) [1818] 3 Swans. 392.
12 Beav. 325.

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HOLROYD, J.

1903

HERMAN v. THE MOUNT LYELL MINING AND RAILWAY COMPANY LIMITED.

sued for the price of the goods in Tasmania, wh
perhaps, the creditor sought out the debtor, would b
of the debt. The assignment of the debt may, howe
to have taken place in Victoria. Although the Act
wide language, it is doubtful if it could apply to de
Victoria. However, I submit the point to the Court's
tion.

Higgins, K.C. (with him *Schutt*) for the plaintiffs
was clearly a good equitable assignment, which m
made verbally. The only question is, "What was the i
Some meaning must be given to the letter of the 23
1902, and none can be given unless it be taken, in c
with the letter of the 22nd, to mean—"The Mount
pany owes us money which you (the bank) are to get
April. If there be any surplus, it is to be placed to
of our account; if not, the whole of it goes in pa
tanto of our overdraft." That was a clear indicatio
bank was to get the benefit of this debt as security fo
of the Hardware Company's overdraft. The money
priated for that purpose, and in consideration thereof
forbore to sue. *Cf. Brandt* v. *Dunlop Rubber Co*
Alexander v. *Steinhardt, Walker & Co.* (*d*); *F*
Dunn (*e*); *Burn* v. *Carvalho* (*f*); *Rodick* v. *Gande*
Gurnell v. *Gardner* (*h*).

(2.) It is reasonably clear that this is a Tasma
which has been assigned. The validity of the assign
chattel depends on the law of the country where the
situate: *The Carron Iron Company* v. *MacLaren* (*i*);
The Mother o' Gold Consolidated Mines Limited (*k*).
tract was made in Tasmania, and the goods were deliv
and the fact that the purchaser is a company incor
Victoria does not make the debt any the less a Tasma

[HOLROYD, J. Does the fact that in the subseq

(*c*) [1903] *Times* L.R. 409.
(*d*) [1903] 2 K.B. 208.
(*e*) [1885] 29 Ch. D. 128.
(*f*) [1839] 4 Myl. & Cr. 690.
(*g*) 1 De G. M. & G. 7
778.
(*h*) [1863] 9 Jur. N.S.
(*i*) [1855] 5 H.L.C. 4
(*k*) [1903] 29 V.L.R.

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e they agree that there should be payment in Melbourne y difference ?]

have to look at the transaction when the goods were ; no subsequent arrangement can affect the question. saction whereby the debtor and creditor agreed that the uld have the security of the debt was also carried out nia. In determining the validity of an assignment of a Court is not concerned with the *locus* of the assignment, determine such validity by the law of the *locus* of the egistration of the assignment was not required by an law, and as the Victorian law does not apply, no ion at all was necessary. He also referred to *Haggin* v. *r d'Escompte de Paris* (*l*); *La Bourgoyne* (*m*); *Dunlop tic Tyre Company Limited* v. *Actien-Gesellschaft, etc.*, *y* (*n*); *Commissioner of Stamps* v. *Hope* (*o*); *In re the Tax Acts* (*p*); *In re Maudslay, Sons and Field* (*q*); *e* v. *Jecks* (*r*).

n in reply—(1.) While no form of words is necessary to e an equitable assignment, a transference or appropria- particular fund is clearly necessary. The meaning of r of 23rd October is—"Will you (the Bank) accept that of the Mount Lyell Company to pay this sum into our your Bank;" and the Bank, putting it most favourably plaintiffs, reply—"Yes, we will accept that promise of nt Lyell Company to pay into your account against your That is a mere dealing with contractual rights. In cases cited the word "assign," or some such word as "direct," or "pay," is used, but nowhere are such words pt this letter against our account" used. *Cf.* on this *eld* v. *Megaw* (*s*) and *Jones* v. *Starkey* (*t*); and on the tion, *Dicey on Conflict of Laws*, pp. 318, 533.

Cur. adv. vult.

89] 23 Q.B.D. 519.
99] P. 1; [1899] A.C. 431.
02] 1 K.B. 342.
91] A.C. 476.
04] 27 V.L.R. 304.
(*q*) [1900] 1 Ch. 602.
(*r*) [1872] L.R. 13 Eq. 597.
(*s*) [1869] L.R. 4 C.P. 660.
(*t*) [1852] 16 Jur. 510.

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HOLROYD, J.

1903

HERMAN v. THE MOUNT LYELL MINING AND RAILWAY COMPANY LIMITED.

HOLROYD, J. By my order on the 7th Septem
certain points of law reserved by the 10th and 11th p
of the defendant Wootton's defence were argued before

In the 10th paragraph of his defence defendant
contends that (His Honor read the paragraph). Tw
Thomas Whyte and Isaac Herman, who carried on b
Strahan in Tasmania under the name of the Mining
Company, became indebted to the plaintiff bank, and
was pressing them for payment. In order to stav
bank's demand they sold certain goods to the Mount Ly
and Railway Company Limited, a company also ca
business in Tasmania, for the sum of 1013*l.*, and an ar
was made that the price should be paid on or befo
April 1903, and that it should be paid to the cre
Mining Hardware Company at the English, Scottish,
tralian Bank in Melbourne on or before that date.
and 5th paragraphs of the statement of claim a
effect (His Honor read the paragraphs). Now the
paragraph of the letter of the 22nd October was a
tion given by the Mount Lyell Company to the
the request of the creditor, the Mining Hardware
that they owed the Mining Hardware Company a sum
for goods; and as I read that letter, that they had ag
the Mining Hardware Company to place that sum in th
Melbourne to the credit of the Mining Hardware Co
or before the date on which that amount was to be
object clearly being that the bank should be induced
hand, and to cease pressing the Mining Hardware Co
pay it upon being satisfied that the Mount Lyell
would place to the credit of the Mining Hardware
the sum indicated on or before the date mention
the next letter, which enclosed the previous one,
bank in terms to accept the previous letter ag
account of the Mining Hardware Company. Wha
the meaning of that? It appears to me it can
this—"The Mount Lyell Company is indebted to
have arranged for the money to be paid to our
or before that day with a view of giving you son

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for the debt we owe to you." It is simply asking them t that letter as security against their account, and this ean "Accept this money, which enclosed letter shows be paid on or before the given date, as security." And s so, it appears to me this is a good equitable assigment ebt due by the Mount Lyell Company to the Mining re Company, which was not due till a future date, but e bank was satisfied would be placed in its hands on or nat date. It was only through the accident of the Hardware Company having executed a deed of assign- t the money was not paid into its credit. If a debtor his creditor an order to receive any money, that is a gnment; and this is much the same thing, although the proceeding is in this case somewhat inverted. The Hardware Company went to its debtor first, and after ts own creditor, and completed the assignment by the etter.

e was another point, and that is contained in the 11th h of the defendant Wootton's defence, which states (His ead the paragraph). It appears to me that when this e assignment was made the debt was a debt of the Mount mpany, which carried on business in Tasmania, and was ne Mining Hardware Company, which also carried on in Tasmania; and therefore it does not come within the *Book Debts Act* 1896 at all, and such section was nded to apply to debts owing by a foreign debtor to a reditor.

Questions answered in favour of plaintiffs.

itors for the plaintiffs: *Braham & Pirani.*
itor for the defendant Wootton: *A. G. Roberts.*

H. I. C.

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F.C.

1904
March 2.

RITTER *v.* CHARLTON.

Justices Act 1890 (*No.* 1105), *ss.* 40, 77—*Id.* 1896 (*No.* 1458), *s.*
audience—Conduct of prosecution—Power of Court of Petty Se

Sec. 77 of the *Justices Act* 1890, which gives a right of audien
their counsel or attorneys, in Courts of Petty Sessions, does not pre
in Petty Sessions from allowing any person whom they may think f
a prosecution under special circumstances.

McGrath v. *Dobie* ([1890] 16 V.L.R. 646) followed.

O'Sullivan v. *McMahon* ([1896] 22 V.L.R. 55) overruled.

ORDER TO REVIEW.

William Charlton was proceeded against upon th
tion of John Ernest Ritter in the Court of Petty S
Wodonga for larceny. The defendant's solicitor having
to the Court dealing with the case, Senior-Constabl
announced that he appeared to prosecute. The
solicitor objected, on the ground that Simpson wa
informant. The Court overruled the objection, and
to hear the case, Simpson conducting the case for
cution. The defendant was convicted. This order
obtained on the grounds—(1) that Simpson could n
the prosecution, not being the informant or the i
counsel or attorney; (2) that the provisions of sec.
Crimes Act 1890 were not complied with on the hea
said information, inasmuch as after the examination
witnesses for the prosecution had been completed,
time, one of the said justices did not state to the def
substance of the charge against him, nor did he then
time say to the defendant these words or words to a
—"Do you consent that the charge against you shall
us, or do you desire that it shall be sent for trial by a

On the return of the order *nisi* Hodges J., stat
would make it absolute on the second ground; that
theless was necessary to deal with the first ground, a
affect the question of costs. In his opinion the order
be absolute on the first ground, the point being c
McGrath v. *Dobie* (*a*) and other cases. As, however, t

(*a*) 16 V.L.R. 646.

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den, C.J., in *O'Sullivan* v. *McMahon* (*b*) conflicted with e, he reserved the point for the Full Court.

patrick to show cause—The point referred is covered by *h* v. *Dobie* (*c*). That is a decision of the Full Court. e of *O'Sullivan* v. *McMahon* (*b*) cannot be considered w. In any case, before the defendant can succeed on of an irregularity of this kind he must show that there n some miscarriage of justice.

ke to move the order absolute—*McGrath* v. *Dobie* was se in Petty Sessions at all. There justices were merely ing whether they would commit an accused person for another court. The procedure in the Court of Petty s is regulated by Act of Parliament and by definite ereunder. The Court has certain definite powers con- on it, and these powers are confined by definite limita- Sec. 77 begins—"The following rules shall be observed, 'hen there is power given to the justices to make rules, se rules, before they can have any force, are to be d of in a particular way. None of the rules so made y power to hear anyone other than parties, their counsel orney. Those provisions of the Act and the rules te the whole procedure of the Court; for instance, it is n assumed that a Court of Petty Sessions would have to deal with people making a disturbance or with eating witnesses. Special provision is therefore made by ute for this purpose.

referred also to *Bertrand's Case* (*d*); *Madden* v. (*e*); and the *Justices Act* 1896 (No. 1458), sec. 3.

CKETT, J., delivered the judgment of the Court ETT, HODGES, and HOOD, JJ.]:—We think that this must be considered as concluded by *McGrath* v. *c*). That was a decision of the Full Court in a of considerable importance, and it was given in

2 V.L.R. 55.
V.L.R. 646.
(*d*) [1867] L.R. 1 P.C. 520.
(*e*) [1899] 25 V.L.R. 325.

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F.C.
1904
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A'Beckett, J.

1890. We must suppose that it has been follo
that the practice of the Court before justices has r
that decision. It seems to us impossible to distinguish
from the present, so far as the grounds upon which the
proceeded are concerned. The argument for the defer
proceeded upon sec. 77, and on the contention that in
right of audience to certain persons there is an
exclusion of any right of intervention on the part c
else. Precisely that argument was addressed to the
McGrath v. *Dobie*, though, upon another section, namel
"By sec. 40," says counsel in that case, "the justices ha
to order that no person shall be present at the pr
hearing except the counsel and attorney for the pr
and the counsel and attorney of any person then bein
place as a defendant and such person. The express
there made of counsel and attorney shows that they
right of audience, and that express mention excludes
of any other person to be heard." Then the argur
refers to sec. 77. In the judgment of the learned Chi
Higinbotham, at p. 649, he says:—"Reliance has be
upon sec. 40 of the *Justices Act* 1890, which provid
proceedings for indictable offences a justice may in cer
if he think fit, exclude certain persons from access to
where proceedings are being taken. Certain excep
therein made: the justice cannot exclude the co
attorney for the prosecution nor the counsel and at
the defendant. That is a very reasonable provision,
only by reference incidentally to the counsel and att
the prosecution that an excuse can be found for the
which has been raised upon this section. It cannot be
with any show of reason where the prosecutor has r
or attorney that the justice is not to accept the aid of
fit and proper person in discharging his duty of he
evidence and dealing with the charge. This is the on
upon which this application rests, and we think tha
ground at all, and inasmuch as this is an established p
the justices in such cases, and it is a practice free
objection, this order has no foundation whatsoever." S

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ve should be drawing a distinction not justified and away the obvious intention, meaning, and effect of this nt if we were to say that this case is not governed by *h* v. *Dobie*. There has been, however, a decision of , C.J., since that case—namely, the case of *O'Sullivan* v. *on* in 1896.

as in deference to that decision, which would support the nt for the defendant here, that, I understand, Hodges, J., ueed to reserve the present case for this Court. In the that decision he did not desire himself to pass it by and *McGrath* v. *Dobie*.

think it is quite clear that the Chief Justice, in *O'Sullivan* *Iahon*, did not observe the full effect of the decision in *h* v. *Dobie*, because he puts it as depending on a section has nothing to do with the decision—at least the head- srepresents the effect of the judgment. It reads:—"The have power under sec. 40 of Act No. 1105 to direct an or of police or any other fit and proper person to conduct ceedings before them whether such inspector or other has sworn the information or not." Sec. 40 has no on to that effect. There is no clear ground that we can upon which the Chief Justice could have decided that he did consistently with *McGrath* v. *Dobie*. We think d to recognize its full effect. We are merely recognizing ll effect in deciding as we have and saying that this of objection cannot be sustained.

e order was made absolute without costs on the second mentioned above, and the case remitted for rehearing.]

citor for the informant: *J. E. Dixon* (for *Wilkinson*).
citors for the defendant: *Barrow & Pearcey* (for *Hood*, ng).

J. M.

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MADDEN, C.J.

1904
February 25.

REX *v.* CHOMLEY, *ex parte* HAND.

Marriage Act 1890 (*No.* 1166) *s.* 52—*Marriage Act* 1900 (*No.* 1684
Pre-maternity order—Appeal to General Sessions—Reasonable tim
—Delay—Dismissal of appeal.

The Court of General Sessions has a discretion under sec. 52 of th
Act 1890 to dismiss an appeal from a pre-maternity order made under
6 of the *Marriage Act* 1900, if, having regard to the circumstances of
be not lodged within a reasonable time.

Held, that a notice of appeal lodged 2½ months after the m
pre-maternity order, and too late for the hearing to take place within
of gestation limited by the order, was not lodged within a reasonable

RULE *nisi* FOR *mandamus.*

Elizabeth Donohue obtained in Petty Sessions at Br
on the 22nd July 1903, a pre-maternity order under se
6 of the *Marriage Act* 1900 against Thomas Hand
payment of 10*l.* into Court for the expenses of her
confinement, and the order fixed the 10th October 19
date on or before which the child must be born or th
lapse.

On the 5th October 1903 the defendant gave notice
to General Sessions for the sittings taking place in N
Judge Chomley, Chairman of General Sessions, held
time which had elapsed was unreasonable, and dism
appeal. A rule *nisi* was obtained, calling upon Judge
and the complainant to show cause why a writ of *m*
should not issue to compel him to hear the appeal.

Potts for the defendant to move the rule absolute.

Cole for the complainant to show cause—By sec.
Marriage Act 1900 the procedure in these cases is t
same as in maintenance cases under the *Marriage Act*
to which it has been held that sec 52 gives, by impli
right of appeal to General Sessions, to which the ordin
cedure and practice of that Court on appeals are to be
See *Regina* v. *Justices of Central Bailiwick, Ex parte M*
The learned Judge had a discretion under that section
that the time which had elapsed was unreasonable.

(*a*) [1881] 7 V.L.R. (L) 90.

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otts in reply—The case cited overruled *Regina* v. *King, arte King* (*b*), in which it had been held that there was no of appeal to General Sessions against an order for mainten- No right of appeal in fact exists; the Court merely ses its discretionery power, and may entertain an appeal ever lodged. Under sec. 52 of the *Marriage Act* 1890 the may interfere even where no notice of appeal is given, in that justice may be done. There is no practice as to when peal is to be lodged in general sessions. In one case an was permitted after eleven months. An appeal to the practicable sittings would in most cases be useless to the lant. After the birth of the child, however, medical ce may be got to show that it could not possibly be that alleged father.

unsel also referred to *Paley on Summary Convictions* d.), p. 372.

ADDEN, C.J. This is a rule *nisi* for a *mandamus* to the d Chairman of General Sessions to hear an appeal. The was one lodged against an order made by justices under *arriage Act* 1900 (No. 1684). That Act prescribes that, a woman believes that she will be confined of a child of given man who is not her husband, she may apply to s to have provision made by him for the expenses which tend the birth of that child; and the money ordered to be y the justices is to be paid into the hands of the Clerk of urt until the child is born, or the period of gestation has , as ascertained by the order. If no child is born within eriod, then the money is returned to the person who paid and if a child is born, then it is paid out to the mother. erfectly plain what the purpose of the Act is—to enable a n to be sure in advance of the confinement expenses ing the birth of the coming infant. In this case, an order ade for payment of 10*l.* on 22nd July 1903. It fixed the October 1903 as the period within which the child must n or the money lapse. On the 5th October 1903 notice of to General Sessions was given by the defendant before the

(*b*) [1880] 6 V.L.R. (L.) 256.

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Ex parte
HAND.

justices. That was given for the General Sessions Court sitting in November 1903. When the appeal came on before the learned chairman, he held that the time which had elapsed before this appeal was lodged was unreasonable under the circumstances, and he therefore dismissed the appeal. It is now said that his act was illegal in so determining.

The position is peculiar as to appeals to General Sessions against orders of this kind, and indeed as to all appeals under the *Marriage Act* 1890. Sec. 52 of that Act provides—" When any two justices have made any such order as aforesaid they shall transmit the same under their hands and seals within twenty days next after the making thereof to the clerk of the peace of the district within which such order is made; and the Court of General Sessions of the peace holden for such district, whether an appeal against the same has been entered or not, may quash, confirm, or vary such order either in whole or in part at its discretion, and may substitute a new order in lieu thereof." The particular Act under which this order was made gives the same appeal as is given in respect of orders under the *Marriage Act* 1890. The appeal, therefore, lodged by the defendant is one such as that Act contemplates. That section, though it gives an appeal, as has been held, provides no machinery as to the practice in lodging, and the ceremonies attending its lodging, and what shall take place at the hearing. The Full Court has determined, in a case of this kind, where the Legislature gives an appeal in fact, but does not provide machinery for hearing it, the Court to which the appeal is given is bound itself to administer it in the most reasonable way it can, and provide the machinery for the appeal. That being so, here was an appeal given to the Court of General Sessions, and the learned Judge held that an appeal which could not be heard until three and a half months after the order was made was, in this case, an unreasonable one, and I am unable to say His Honor was wrong.

What has been argued is very true, that any practice adopted for administering appeals must be reasonable, and must be reasonably certain, and such that the people who are prosecuting the appeal may see that there is certainty about it. It is said

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that the time here would have allowed the witnesses who would have to give evidence to get scattered, or to die, or become unavailable, and therefore it is unfair to postpone the appeal until that condition of things might arise. I think that although generally there must be some degree of certainty, it may possibly be that the very reason why the Legislature left this appeal given under sec. 52 so very elastic, and so very free from restriction, was that the Court of Appeal might apply its own practice to the matter, it being *sui generis*. The object is that a woman shall not suffer for want of money. The intention is that she shall have in advance a provision with some degree of certainty for her confinement expenses; that before the child is born the money may be pratically in her hands. If, therefore, the money which is in the hands of the Clerk of Petty Sessions may be prevented from reaching her until after she has been confined, and by means of an appeal lodged late to defeat the order made in her favour, the Judge is entitled to consider all that as an element in the reasonableness of the time for appeal. The Act is very special and very peculiar, and that should be taken into consideration. It may be very hard on a man against whom an order has been made, and who, when looking at *ex post facto* proof, may have very cogent evidence that he is not the father. That would be unfortunate for the man, and it teaches us that it is wise to keep clear of ladies unless we meet them at church. It is a risk which attends such enterprises, for the Justices may, of course, go wrong. I am not impressed by the instance quoted of a white man being charged by a white woman, who afterwards gave birth to a child more or less black, because it is not as conclusive as it looks. That is not uncommon in America, but is not due to reasons suggested. One's ancestry may have included even a slight taint of negro blood, and it is well established that telegonic sympathy may affect a child, so that white parents produce a child much more pronouncedly negraic than the remote ancestor. Nature produces many curious effects of this sort, but the justices can only arrive at their determination as best they may. The Judge is to decide as to the reasonableness of the time of lodging the appeal, and I cannot dictate to the

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Chairman of General Sessions as long as his de
unreasonable, and I am not able to say he is wrong
he has taken. The rule will be discharged, with co

Rule discharged, w

Solicitor for the applicant: *Potts.*
Solicitors for the respondent: *Cole & Morris.*

F.C.

1903
October 13, 14, 28,
December 9.

WILLIAMES *v.* VICTORIAN RAILWAYS COMMI

The Railways Act 1890 (*No.* 1135), *s.* 70—*Holding office du Dismissal—Exercise of pleasure.*

Railway officers and *employés* appointed under the provisions *Railways Act* 1890 hold office during the pleasure of the Commis be removed by the Commissioners at their pleasure.

The plaintiff, who, as an officer or *employé* appointed under t sec. 70 of the *Railways Act* 1890, received a notification from the Railways Commissioners, that unless he obeyed an order already him to sever his connection with a certain association by a he would be removed and his services dispensed with; the plai sever his connection with the association then received a notice refused to carry out the instructions given his services were no In an action for wrongful dismissal,

Held, that the plaintiff had been removed at the pleasure of the

REFERENCE to the Full Court.

This was an action brought by the plaintiff recover damages for wrongful removal or dismissal Victorian Railways Commissioners.

The following were the pleadings so far as mate

1. The plaintiff was at all times material to th *employé* of the Victorian Railways Commissioners in service of the State of Victoria.

2. In or about November 1886 he was appoin *employé* under and by virtue of the *Railways Act* and subject to the provisions of such Act and his continued under such Act and the Acts amending th

4. On or about the 6th May 1903 he receive defendants a notice in writing stating that on or af

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May 1903 unless he resigned his position as one of the executive of the Victorian Railways Daily Paid *Employés'* Union or unless the said union severed its connection with a body called or known as the Trades Hall he would be removed and his services dispensed with as and from the 13th May 1903 without further notice.

5. At 11 o'clock p.m. on the 12th May 1903 he, not having resigned his position as one of the executive of the said union and the said union not having severed its connection with the Trades Hall, duly attended at the place required for the performance of his duties as such signalman aforesaid and being ready and willing then and there to perform such duties was told by a servant or officer of the defendants authorized in that behalf that he would not be allowed to resume and perform his duty and received a written notice to that effect served by or on behalf of the defendants.

6. He then was and always has been ready and willing to do his work and perform his duties as such signalman and *employé* as aforesaid but the defendants have refused to employ him and have not allowed him to resume his duties.

7. He will contend that by reason of the circumstances above mentioned the defendants have removed him from his position or appointment as such signalman or *employé* as aforesaid contrary to the powers and authority of the Act of Parliament under which he was so employed and appointed or of the Acts amending the same.

8. He will also contend that by reason of the circumstances aforesaid the defendants wrongfully dispensed with his services as such signalman or *employé*.

9. Alternatively he says that under and by reason of the circumstances aforesaid the defendants wrongfully dismissed him from their service.

The defence raised the following questions, after setting out the notice referred to in the claim and the fact that the plaintiff refused to comply with the terms thereof :—

9. On the 25th day of April 1903 the Honourable Thomas Bent His Majesty's Minister of Railways being the responsible Minister of the Crown administering the *Railways Acts* under

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and in accordance with the provisions of sec. 24 of the *Railways Act* 1891 by writing requested the defendants to propose in writing a scheme for carrying out a certain matter of general policy within the meaning of the said sec. 24 namely that *employés* in the railway service should not by affiliation of railways associations or otherwise be or remain connected either directly or indirectly with the Trades Hall or any other outside labour organization.

10. Pursuant to the said request of the said Minister of Railways and in accordance with the provisions of the said sec. 24 the defendants on the 28th day of April 1903 proposed in writing a scheme for carrying out the said matter of general policy, and on the said 28th day of April 1903 the said Minister of Railways approved in writing of the said scheme and directed the defendants to carry out the same.

11. Thereafter pursuant to the said approval and direction of the said Minister of Railways the defendants gave to the plaintiff the notice in writing in paragraph 4 hereof referred to but the plaintiff wholly failed to comply with the requirements of the said notice and on the 12th day of May 1903 by letter refused to comply with the same whereupon the plaintiff was removed and his services were dispensed with by the defendants which are the alleged grievances.

12. The defendants will contend that under and by virtue of the provisions of the *Railways Acts* the plaintiff held office in the service of the defendants during pleasure only and was employed by them during pleasure only and they say that under the circumstances hereinbefore set forth and in exercise of the powers on them by the said *Railways Acts* conferred they removed the plaintiff and terminated his employment in their service as from the said 12th day of May 1903 and the defendants will rely upon the provisions of the *Railways Acts.*

The following admissions of fact were made by the parties:—

1. At all times material to this action the plaintiff was an *employé* of the Victorian Railways Commissioners in the railway service.

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2. On or about the 17th day of November 1886 the plaintiff was under and by virtue of the provisions of the *Victorian Railways Commissioners Act* 1883 appointed on probation to the grade of labourer in the railway service and on or about the 4th day of August 1877 the said appointment was confirmed by the defendants.

3. On or about the 28th day of October 1889 the plaintiff having duly passed the necessary examination and received a certificate of competency was employed by the defendants as a signalman and thereafter continued so to be employed until the 12th day of May 1903 (setting out the various rates of wages paid to the plaintiff during his employment).

4. On the 25th day of April 1903 the Honourable Thomas Bent His Majesty's Minister of Railways being the responsible Minister of the Crown administering the *Railways Acts* purporting to act under and in accordance with the provisions of sec. 24 of the *Railways Act* 1891 by writing made request of the defendants in the words and figures following:—

Railway Offices 25th April 1903.

To the Victorian Railways Commissioners.

Under the powers vested in me by sec. 24 of the *Railways Act* 1891 I hereby request you to propose in writing a scheme for carrying out the policy that *employés* on the railways should not by affiliation of railway associations or otherwise be or remain connected either directly or indirectly with the Trades Hall or any other outside labour organization.

THOMAS BENT
Minister of Railways.

5. Pursuant to the said request of the said Minister of Railways and purporting to act under and in accordance with the provisions of the said sec. 24 the defendants proposed in writing a scheme for carrying out the policy that *employés* on the railways should not by affiliation of railway associations or otherwise be or remain connected either directly or indirectly with the Trades Hall or any other outside labour organization

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the said writing being in the words and figures following:—

Victorian Railways Commissioner's Office
Spencer St. Melbourne 28th April 1903.

Memorandum.—With reference to your request under date 25th instant that the Commissioners should "propose in writing a scheme for carrying out the policy that *employés* on the railways should not by affiliation of railway associations or otherwise be or remain connected either directly or indirectly with the Trades Hall or any other outside labour organization" I beg to propose for your approval that the followng course should be adopted viz.:—

(1) That a general order should be issued by the Commissioners to the *employés* on the executives of the associations which have refused to obey the direction already given to that end that they should within three days from the date of the order either sever their connection with the Trades Hall or resign their positions as executive officers of associations so refusing obedience to the Commissioners.

(2) That the Commissioners should use the powers vested in them to enforce obedience to such order.

In pursuance of the powers and authorities conferred upon me by sec. 6 of the *Victorian Railways Commissioners Act* 1903 and the Order in Council made thereunder and dated the 6th day of April 1903 I propose the adoption of the foregoing course of action.

W. FITZPATRICK Commissioner.

The Hon. the Minister of Railways.

6. On the said 28th day of April 1903 the said Minister of Railways wrote upon the document in the last preceding paragraph set out the words and figures following:—

28/4/1903. I approve of this course.

THOS. BENT
Minister of Railways.

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7. On or about the 6th day of May 1903 the defendants pursuant to the terms of the documents set out in paragraphs 4 5 and 6 hereof gave to the plaintiff and the plaintiff received from the defendants a notice in writing in the words and figures following:—

Victorian Railways.
Commissioner's Office Spencer St.
Melbourne 6th May 1903.

Memorandum.—I desire to inform you that unless you obey the order addressed to the executive of the Victorian Railways Daily Paid *Employés'* Union of which union you are one of the executive officers and inform me thereof in writing on or before Tuesday the 12th instant you will be removed and your services dispensed with as from that date without further or other notice. A copy of the order referred to is enclosed.

W. FITZPATRICK Commissioner.

(Copy) Victorian Railways.
Commissioner's Office Spencer Street
Melbourne 29th April 1903.

Memorandum.—As Commissioner of Railways authorized by Order in Council to exercise all the powers and authorities of the Victorian Railways Commissioners and for the purpose of carrying out the general policy directed by the Hon. the Minister of Railways I direct that the *employés* on the executives of the following associations—The Locomotive Engine Drivers and Firemen's Association The Victorian Railways Daily Paid *Employés'* Union The Victorian Railways Carriage Builders' Society—which have already through their respective executives declared that they will not comply with my previous direction to sever their connection with the Trades Hall do within 3 days either sever that connection or resign their positions as executive officers of associations so refusing obedience to me.

(Signed) W. FITZPATRICK Commissioner.

Mr. A. T. Smith Secretary Victorian Railways Daily Paid *Employés* Union 48 Park Street Abbotsford.

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8. During the months of April and May 190 was and still is an executive officer of a Railw known as The Victorian Railways Daily P Union.

9. During the months of April and May 1903 Railways Daily Paid *Employés'* Union was and s with and connected with the Trades Hall.

10. On the 12th day of May 1903 the plai refused to comply with the requirements of th preceding paragraph 7 set forth the said letter words and figures following:—

Victorian Railways Daily Paid *Employés'*

12th

Mr. Fitzpatrick Commissioner of Railways.

Sir,—In answer to your memorandum of 6th state that I cannot comply therewith. I desire to this answer is not intended as an act of disob terms of the memorandum would seem to imply. as I look at it is one involving a question of law order" is "an order" in the legal sense and submit that I should be allowed to test its le being in the first instance charged with dis subjected to a penalty which could only be sus ground of the legality of "the order." I sugg fairness the question of legality should be tested ment is inflicted as in accordance with your men must not report for duty to-morrow.

Yours obediently

W. F. WILLIAMES

11. Subsequently to the receipt by the defe letter in the last preceding paragraph hereof set f say shortly before midnight on the 12th day of plaintiff received a notice written on behalf of the the words and figures following:—

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District Traffic Superntd's Office,
Flinders Street Station,
Melbourne 12th May 1903.

Signalman W. F. Williames.

As you have refused to carry out the instructions contained in the Commissioner's memo. of 6th inst. you are not to be allowed to resume duty. Further instructions will follow.

S. JONES, Dist. Traffic Supt.

12. Save in so far as the facts hereinbefore set forth are to the contrary the plaintiff has always been ready and willing to do the work and perform the duties of a signalman and *employé* in the service of the defendants.

13. Since the receipt by the plaintiff of the notice in the preceding paragraph 11 set forth the defendants have refused to employ him and have not allowed him to resume work.

14. That the plaintiff duly insured his life and at all times material to this action duly kept the said insurance in force.

The case came on before Hodges, J., who, at the request of the parties, referred the case to the Full Court.

W. H. Moule for the plaintiff—The plaintiff did not hold office during pleasure. Sec. 70 of the *Railways Act* 1890, which provides that all *employés* shall hold office during pleasure, is so inconsistent with the later provisions of the Act and of the amending Acts that it must be taken to be repealed. Sec. 70 was taken from an English Act, which has no provisions similar to the later sections in this Act. In *Gould* v. *Stuart* (*a*) it was held that, although all officers of the Crown hold office during pleasure, and although that right of the Crown will be read into Acts of Parliament, yet inasmuch as the sections of the *Civil Service Act* in that case were clearly inconsistent with the existence of such prerogative, the Act must be read as repealing the same. The sections in the *Railway Act* 1890 conferring rights upon the *employés* are stronger than the sections in the *Civil Service Act* in *Gould* v. *Stuart*, and therefore are so inconsistent with sec. 70 that they must be taken to repeal those

(*a*) [1896] A.C. 575.

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provisions of sec. 70 which are inconsistent. Sec. 79 provides that "every person employed in the railway service shall be deemed to be employed in a permanent office except persons employed as supernumeraries." Now, it is ridiculous to speak of a person being employed in a "permanent office" if he is liable to be dismissed at pleasure; there is no permanency; it becomes simply an office at pleasure which is always spoken of as contrasted with a permanent office. Then provision is made in sec. 82 compelling every person employed in the service to insure his life, payable at death or at the "age of retirement." If a person can be removed at pleasure, it may destroy the whole effect of the insurance, as the policy may refer merely to the "age of retirement," a term used in various parts of the Act. Secs. 86, 87, and 88 give the *employés* a right of appeal in case of any charge being made against them. It would be of little advantage to have a right of appeal if, upon being successful in the appeal, the *employé* could be discharged at pleasure. These appeal sections are amended by Acts No. 1250 and No. 1439, and the rights of *employés* are considerably strengthened. Secs. 89 and 90, as they originally stood, made the office forfeitable upon insolvency, but now by sec. 30 of Act No. 1324, even though a man has become insolvent he cannot be dismissed for that cause, and the Commissioners may merely recommend dismissal, but it is the Governor in Council who has to dismiss. Then sec. 91 speaks of a record being kept of "deaths, dismissals, and resignations," but nothing is said about removals at pleasure. Sec. 94 protects *employés* from punishment for refusing to work on Sundays, but it affords no protection if the Commissioners can simply dismiss such a man at his pleasure; they must not punish him, but he is turned out of the service. The same remark applies to sec. 12 of Act 1439, which is supposed to protect an *employé* if he presumes to bring an action against the department. (Counsel also referred to various sections in Acts No. 1250 and No. 1439.)

Secondly, suppose the defendants have the right to dismiss at pleasure, they have not exercised that pleasure. In *Hayman* v. *Governors of Rugby School* (*b*) it is clearly stated that, where a

(*b*) [1874] L.R. 18 (Eq.) 28, at p. 69.

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body has a right to dismiss at pleasure, it may do so without stating any reason, but if reasons are given the Court will look at their sufficiency: See also *Rex* v. *Mayor of London* (*c*); *Grant on Corporations*, pp. 244, 245; *Kyd on Corporations*, vol. ii., p. 59; *The King* v. *Slatford* (*d*); *Capel* v. *Child* (*e*); *Dunmer* v. *Chippenham* (*f*); *Willis* v. *Childe* (*g*); *Queen* v. *Ipswich* (*h*). The case of *Reg.* v. *Darlington* (*i*) is in some degree inconsistent with this view, but it has been questioned in the later decision of *Dean* v. *Bennett* (*k*). The defendants have dismissed the plaintiff for disobedience. They have charged him with a grave offence, and have never permitted him to be heard in his defence. They purport to dismiss him because he would not obey a certain order; that is not the exercise of their "pleasure," it is distinctly a dismissal for a specified reason, for an act of disobedience, and the plaintiff had a right to be heard. It is a general principle of law that no man is to be deprived of any part of his property by any judicial proceeding without having an opportunity of being heard: See *Hawkins's Pleas of the Crown*, 49, Book 1, c. 64, s. 60 (7th ed.); *Fisher* v. *Jackson* (*l*).

(Counsel was stopped by the Court.)

Mitchell (with him *Pigott*)—[PER CURIAM. We desire to hear you on the second point only.] The defendants have plainly indicated that it is their pleasure that the plaintiff shall no longer continue in their service. No matter what reasons may be assigned for the exercise of that pleasure, the pleasure is nevertheless exercised. In *Reg.* v. *Darlington* the body which had a right to remove at their discretion gave reasons, these reasons were all negatived by the findings of the jury, and yet the Court held that as the governing body, which had a discretion, had exercised its pleasure, the Court could not interfere. *Dean* v. *Herbert* in no way disputes this principle. The precise point was decided in the case of *Titterton* v. *New*

(*c*) [1832] 3 B. & Ad. 255, p. 274.
(*d*) [1696] 5 Mod. 316.
(*e*) [1832] 2 Cr. & J. 558.
(*f*) [1807] 14 Ves. 245.
(*g*) [1850] 13 Beav. 117.
(*h*) [1706] 2 Ld. Ray. 1240
(*i*) [1844] 6 Q.B. 682.
(*k*) [1870] L.R. 6 Ch. 489.
(*l*) [1891] 2 Ch. 84, at p. 99.

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South Wales Railways Commissioners (*m*), and the same principle has been applied in the cases of *Greene* v. *The Queen* (*n*), *Power* v. *The Queen* (*o*), *Foran* v. *The Queen* (*p*); *Tapping on Mandamus*, pp. 201, 202; *Short on Mandamus*, 397.

Moule in reply.

Cur. adv. vult.

HODGES, J., read the judgment of the Court [HOLROYD, A'BECKETT, and HODGES, JJ.] Under the provisions of the *Victorian Railways Commissioners Act* 1883 the plaintiff was in November 1886 appointed on probation to the grade of a labourer, and in August of the following year that appointment was confirmed by the defendants. In October 1889 he was employed by the defendants as signalman, and continued so employed until the 12th of May 1903.

By writing dated 25th of April 1903 the Minister of Railways—purporting to act under sec. 24 of the *Railways Act* 1891—requested the defendants to propose in writing a scheme for carrying out the policy that *employés* on the railways should not, by affiliation of Railway Associations or otherwise be or remain connected, either directly or indirectly, with the Trades Hall or any other outside labour organization. Pursuant to that request, the defendants, purporting to act under the said sec. 24, proposed by a memorandum dated the 28th of April 1903—

(1.) That a general order should be issued by the Commissioners to the *employés* on the executives of the Associations which have refused to obey the direction already given to that end—that they should within three days from the date of the order either sever their connection with the Trades Hall or resign their positions as executive officers of Associations so refusing obedience to the Commissioners.

(2.) That the Commissioners should use the powers vested in them to enforce obedience to such order.

And on the same day the Minister of Railways signified in writing his approval of the proposed course. The plaintiff was during April and May 1903 an excutive officer of "The

(*m*) 16 N.S.W. L.R.
(*n*) 17 V.L.R. 329.
(*o*) [1873] 4 A.J.R. 144.
(*p*) [1890] 16 V.L.R. 510, 522.

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ian Railways Daily Paid *Employes'* Union," which was ed to and connected with the "Trades Hall."

out the 6th of May the plaintiff received from the lants certain documents. (His Honor read the documents t in paragraph 7 of the admissions, *ante*, p. 571.)

e presume, from the terms of the former memorandum, he latter of the two memoranda had previously been d to the plaintiff and had been disregarded by him. ver this may be, the plaintiff on the 12th of May wrote to fendants as follows (His Honor read the document set out agraph 10 of the admissions, *ante*, p. 572).

terwards, on the same day, plaintiff was notified that as d refused to carry out the instructions contained in the randum of the 6th of May he was not allowed to resume and that further instructions would follow. The plaintiff ot been allowed to resume duty, and complains—(1) that he een removed from his position of signalman contrary to the s and authority of the Act of Parliament under which he ppointed or of the amending Acts; (2) that his services wrongfully dispensed with; and alternatively (3) that he een wrongfully dismissed.

e first view put forward on plaintiff's behalf was that his ntment was an appointment to an office during good iour, that his tenure was a life tenure so long as he ed himself, properly discharged his duties, and obeyed orders as the defendants could lawfully command a signal- to obey; that his connection with the Trades Hall was ly outside his official duties, and in no way interfered with ; and that the defendants had no more right to constrain n this respect than they had to dictate to him as to the ns he might ask to his house, or the shop he might order provisions from. On the other hand, the defendants say he was appointed during pleasure only, and that the missioner no longer desired to retain his services, and ved him under sec. 70 of the *Railways Act* 1890. To mine which of these conflicting views is right, it is sary to examine briefly the Statute under which plaintiff appointed and Statutes amending it.

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The plaintiff was appointed under sec. 16 of the *Victorian Railways Commissioners Act* 1883. That is the section which gave the Commissioners authority to appoint. Apart from that section they had no power to appoint plaintiff. That section enacted—"The Commissioners shall as hereinafter provided from time to time appoint a secretary accountant and clerk and appoint or employ such engineers traffic managers locomotive superintendents surveyors collectors and other officers and *employés* to assist in the execution of this Act as the Commissioners think necessary or proper and *such persons shall hold office during pleasure only.*"

That appears to us as clear and explicit a declaration as the Legislature could make to the person employed, that he was engaged during the Commissioners' pleasure only. It is the section which authorizes the employment of the plaintiff, and it expressly limits the authority of the Commissioners to make contracts to continue during pleasure only. Further, the section immediately afterwards empowers the Commissioners from time to time to "remove" such *employés*, and either discontinue the offices or *appoint others in the room of such as* are so removed, thus plainly indicating that the power of "removal" or the determination of the pleasure is not in any way restricted to cases where the office is abolished. It was however argued, on behalf of the plaintiff, that if later sections in an Act of Parliament are inconsistent with prior sections, the later repeal the prior ones. But while admitting that the last words of the Legislature must prevail, the Court will not hastily determine that one section in an Act of Parliament repeals another in the same Act by reason of some fancied inconsistency, and will rather endeavour to preserve the whole Act, and to give effect to every section and every word in it. Certainly where the words are as strong and clear as in this section the Court would be slow to infer that the Legislature meant to repeal this provision, and would not so infer unless it saw that this provision and the others could not stand together, or that some language was used clearly showing an intention to repeal in whole or in part the first part of sec. 16. The plaintiff alleges that sec. 24 discloses such an intention, as it would be absurd to appoint persons to be

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examiners of candidates for employment, and for the examination of *employés* desiring to be promoted, if such appointment and promotion were to an office or employment only during pleasure. But we are unable to see any inconsistency or absurdity in this. In such a service as the railways it may be desirable that a person should not be appointed for a day or an hour without examination as to the fitness of the person. A signalman or engine-driver, in a few minutes, might do irreparable mischief to life and limb, and, no matter for how short a time employed, care should be exercised in inquiring into his fitness. And there is no inconsistency in the Legislature saying that the Commissioners shall only appoint during pleasure, and shall not appoint during pleasure without an examination into the fitness of the person who is a candidate for employment.

Sec. 25 was next relied on for the same purpose. We think similar observations apply to this section. There is only one word that requires special observation. The section speaks of the Commissioners requiring additional persons in "permanent offices," and stress is naturally laid on the word "permanent." It is, however, the office that is spoken of as permanent—not the officer, and I see no reason why a "permanent" office cannot be occupied at any time by an officer who only holds office during pleasure. Further, the 26th section shows how the word "permanent" comes to be used. It divides the railway *employés* into two classes, one class being supernumeraries, the other class those *deemed* to be employed in a permanent office. The two classes are not supernumeraries and permanent officers, but supernumeraries and those *deemed* to be employed in a permanent office. And there is not any inconsistency in saying to a person—"You are appointed during the pleasure of the Commissioners only, but you are to be deemed to be employed in a permanent office."

Reliance was next placed on sec. 34, which provides (*inter alia*) that "any charge brought against any *employé* for the breach of any rule or regulation or for misconduct may be investigated and dealt with by the Commissioners who may suspend such *employé* . . . . or may dismiss him and their decision shall be final."

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It is argued that there is an absurdity in making provision that the Commissioners may hear a charge, and may dismiss the person charged, if without any hearing they may remove him. We fail to see any absurdity in this.

The Commissioners may have no desire to remove an *employé*, may even desire to retain his services, provided he be not guilty of the misconduct with which he is charged, and if that be so should hear the charge, in order to determine what course they should take. We would add that, in our opinion, even if the Commissioners should arrive at the conclusion that the charge made was not proved, and that they ought not on the evidence before them to find the man guilty of the charge and therefore dismiss him, that they might acquit him and refuse to dismiss under sec. 34, and decline to do an act which would have the direct effect of blackening his character, and yet that they might remove him under sec. 16, as they could not permit the lives of citizens to be in the keeping of one whose conduct they had reason only to suspect; that such a view would justify them under sec. 16 in determining the *employé's* service. Some of the above sections have been altered, and various Acts have been passed amending the *Railways Act*, but the scheme in substance remains unaltered, the scheme that all employments are "during pleasure only," and that the Commissioners' determinations are final. And it is significant of the intention of Parliament that, notwithstanding amendments from time to time, the Legislature has never directly touched the wording of sec. 16.

This question has presented itself to us also in another way. Suppose sec. 16 had been the last instead of the earliest of these sections, could it have been said that sec. 16 repealed all these other sections? According to the argument it must, because it is inconsistent with them, and yet in that case the matter does not seem to us open to argument. If it would not repeal the other sections if it were last, the other sections will not repeal it because they happen to be placed after it. In support of the same argument, other sections were referred to by plaintiff's counsel, which we do not propose to criticise in detail, as they are all met by observations of the kind already made.

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It was next argued that even if the employment was during the pleasure only of the Commissioners, yet the Commissioners have dismissed the plaintiff under sec. 87 of the *Railways Act* 1890, and the procedure prescribed by that section has not been followed; that plaintiff has been dismissed for cause, which can only be done after hearing the plaintiff, and that he has not been heard. It appears to me that sec. 87 has nothing to do with the case under consideration. That section applies only to cases which are initiated by persons other than the Commissioners and not to cases initiated by the Commissioners themselves, and in respect to which the facts are entirely within the Commissioners' own knowledge. The first part of this clause empowers officers in charge of railway stations to temporarily suspend. The second part of the clause deals with charges brought against an *employé* for breach of any rule or regulation or for misconduct, and empowers the Commissioners to investigate and deal with them. This cannot refer to cases initiated by the Commissioners themselves and the facts in connection with which are in their own knowledge. The situation of the words in the section is against such a construction. They follow immediately on the power given to officers in charge of a station to suspend, which would be probably on account of some charge that the *employé* had broken some rule or regulation, or had been guilty of some misconduct, and the collocation of the words in the section indicates that the second clause is mainly, if not wholly, a provision as to the mode in which such cases in the first clause as involve any such charges as are specified in the second clause are to be dealt with; and does not extend to cases where the Commissioners are the sole movers. It would be strange if the Commissioners were to be prosecutors and judges. And the procedure would be still more anomalous under sec. 11 of Act 1439, as under that section the Commissioners would be prosecuting one of their *employés* before a Board consisting of their subordinate officers and a representative of the *employés*. In that case the Commissioner might be required to give his evidence on oath. Afterwards, if there were an appeal from the Board to himself, the Commissioner would not only be prosecutor and final judge, but would

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also be witness, and would have to administer the oath to himself. We cannot believe that the Legislature intended any such procedure, and consequently are of opinion that sec. 87 and the amending section refer only to cases initiated extra the Commissioner. In the next place, the Commissioner did not act or purport to act, or intend to act, under sec. 87 of Act 1135. He appears to have acted, and intended to act, under sec. 16 of the original Act—*i.e.*, under sec. 70 of the existing Act. The Minister of Railways, purporting to act under sec. 24 of Act 1250, had requested the Commissioner to propose a scheme whereby railway *employés* would not remain directly or indirectly connected with the Trades Hall or any outside labour organization. And the Commissioner purporting to act under that section and sec. 6 of Act 1825 proposes the adoption of the general order previously set out, and the use of the powers vested in the Commissioners to enforce obedience to that order.

There is no reference, direct or indirect, to *charges* of any kind against the *employés*. The proposal is to use the "powers vested" in the Commissioners to enforce obedience. What is the power? A power to decline to continue to employ such persons as will not comply with the determination of the Commissioners. The Commissioners do not allege any duty on the part of the *employés* to obey their order in this respect, and do not pretend that the *employés* are guilty of any breach of contract if they disobey such order, but they say in effect—"You can obey it or not as you please, but if you do not please to obey this order it is our pleasure not to retain your services any longer. You are free to disobey the order, and we are free to decline your further services."

The Commissioners do not purport to inflict any fine, penalty, or forfeiture, nor to place any stain on the character of the *employés* who refuse to sever their connection with outside labour organizations. They simply take up the position of a master who has a servant whose term of service is just expiring, and who is considering whether their relation as such is to continue, and the master proposes to impose a new duty on the servant which the servant will not undertake, and the master thereupon declines the further services of his then *employé*.

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herefore, of opinion that sec. 87 has no application to r under discussion.

s also contended that even if the employment was ng pleasure only, yet if the Commissioners gave a e power to determine the service at pleasure is l the Commissioners must justify the ground on ey dispensed with plaintiff's services. It may be fail fully to appreciate this argument, and we think based on the fallacy that if any reason is given it such a reason as would justify the putting an end tract which had some time to run. If a man is to serve another during that other's pleasure, that y determine the service without giving any reason. reason he may have may be a very poor one. But it is ry to him, and it leads him to no longer desire the of the former. If the reason be expressed it makes o worse so far as the contract is concerned. To other e reason may be sufficient or insufficient, good or bad. service is by contract during the pleasure of that d though the reason may be utterly insufficient in our the contract is not that the man is to retain his ent until his master can state a ground that would cease to employ him, but only that he is to retain his ent as long as his master wants him to remain, and his es not want him to remain, and there is an end of the cording to the terms of the contract agreed upon between the course of the argument we were referred to the *Rex* v. *The Mayor of London* (*q*). The decision in in no way conflicts with the conclusion at which we ived on the matter before us. There the Mayor and of London refused to admit and swear in Michael who had been duly elected), and a *mandamus* was to the Mayor and Aldermen requiring them to admit r in Scales. They returned that from time imme- ey had authority to examine and determine whether on to be admitted was according to their "discretion d consciences" a fit and proper person; that they

(*q*) 3 B. & Ad. 255.

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did examine and determine and did adjudge according to their *discretion and sound consciences* that Scales was not a fit and proper person. The Mayor and Aldermen did not set forth any facts or grounds as the basis of their determination. The Court held the return good, and did not require to know any further reason for the determination. That was the decision, and it is at once apparent that it in no way affects anything that we have determined. There is, however, a dictum of Taunton, J., which does support plaintiff's contention.

The learned Judge says, at p. 274:—"The cases cited show that when a corporate office is held *durante bene placito*, it is a sufficient return to a *mandamus* that the corporation have determined their pleasure; but if the corporation are so candid as to state their reasons and allege bad ones, this Court will in such cases interfere."

The first observation we would make on this dictum is that it may possibly express the law where the determination has to be according to a "sound conscience," and it might be open for the Court to say whether any particular reason adduced could operate on or influence a "sound conscience." The next observation is that the dictum seems indirectly at variance with the language of Patterson, J., at p. 275:—"Then, as to returning the reasons which guided the discretion of the Lord Mayor and Aldermen, it appears to me that to require this would be wholly inconsistent with the custom itself; because then the fitness and qualification of the person would be determined, not by the discretion and sound consciences of the Mayor and Aldermen, but by the discretion and sound consciences of this Court. It therefore appears to me that this is a good return."

The latter part of this language appears to apply even if the return stated the reasons, and the Court inquired into and overruled their decision because dissatisfied with their reasons; then the matter would be determined according to the "discretion and sound consciences" of the Court, and the Court's discretion and conscience would be substituted for that of the persons appointed by law. As a last observation on this dictum, it must be taken to be overruled by the decision of the Exchequer

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Chamber in the *Darlington School Case* (*r*). There the governors of the school had removed the master, who held office during pleasure, or whom they were entitled to remove according to their sound discretion. In the return to the *mandamus* the governors set forth their reasons, and that they had removed the master in the exercise of their best discretion; the verdict negatived all the reasons. Nevertheless the Court of Queen's Bench, and afterwards the Exchequer Chamber, held the return good. The material part of the return was the exercise of the discretion; the reasons were immaterial. Denman, C.J., says (page 697.) :—"The power of the governors so to remove justifies their so doing, and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it." But after all the dispute now before us has to be determined by the construction of the Statutes, and is very little aided by the examination of authorities. And apart from the construction of sec. 87, the sum and substance may be thus briefly stated: Sec. 16 of the *Victorian Railways Commissioners Act* 1883 was not repealed by the subsequent sections or by subsequent legislation until replaced by sec. 70 of the *Railways Act* 1890. And consequently the plaintiff's employment was by virtue of the Act of Parliament "during pleasure only" of the Commissioners. It is the pleasure of the Commissioners to dispense with his services. If we interfere with that discretion we shall be substituting the wisdom of the Court for that of the Commissioners, inquiring into what reasons would lead *us* to dispense with an *employé's* services, and to a large extent taking the management of the railways into the hands of the Court and out of those of the Commissioners, in which it has been placed by the Legislature. We are therefore of opinion that judgment should be entered for the defendants, with costs.

Solicitor for the plaintiff: *Marshall Lyle.*
Solicitor for the defendants: *Guinness*, Crown Solicitor.

W. H. M.

(*r*) 6 Q.B. 682.

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December 8.

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Insolvency Act 1890 (*No.* 1102), *s.* 139—*Insolvency Act* 1897 (*No.* 1513), *s.* 10 (1) —*Certificate—Dispensation with condition—Circumstances for which insolvent cannot justly be held responsible—Nature of responsibility—Payment of costs made condition precedent to certificate.*

To entitle an insolvent to dispensation with the condition of payment of 7*s.* in the pound under sec. 139 of the *Insolvency Act* 1890, what must be shown is not the absence of any imprudence leading to his insolvency, but freedom from responsibility for the insufficiency of his assets to pay the statutory amount.

Where it was shown that an insolvent never had any assets beyond what he earned as a labourer,

Held (by the Full Court, Hodges, J., dissenting), that the Court of Insolvency was justified in dispensing with the statutory condition, although his insolvency has been brought about through his imprudence and temper in breaking a contract.

Under the above circumstances, the Court of Insolvency, having found that an opposing creditor was justified in bringing the facts before it, granted the certificate, but made the payment by the insolvent of the creditor's costs a condition precedent to the issue of the certificate.

Held, that it had power to do so.

APPEAL FROM COURT OF INSOLVENCY.

Frederick Charles Harding, an insolvent, had applied under Part VIII. of the *Insolvency Act* 1890 to the Court of Insolvency at Geelong for a certificate of discharge and for a dispensation with the condition of payment by his estate of 7*s.* in the pound. The application was opposed by one Sutherland, a creditor in the estate.

From the evidence taken at the hearing of the application it appeared that the debts of the insolvent amounted to 275*l.*, including the amount due under a judgment recovered by Sutherland for a breach of contract. This contract between Harding and Sutherland was that the former should cultivate on the share system certain land belonging to the latter. Owing to a disagreement Harding refused to carry out his contract. Sutherland, in 1898, sued him, and recovered judgment in the Supreme Court. The amount of this judgment was still owing when Harding, in 1902, filed his schedule, and it formed the chief part of the debts of his estate. It further appeared that at the date of the contract Harding was without capital, and had borrowed horses, imple-

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ments, etc., to enable him to carry on from his father. The further facts appear from the reasons given by the Court of Insolvency, which granted the application, but made the issue of its order conditional on the insolvent paying the opposing creditor's costs of the application. The Court gave the following reasons for its order:—"The Court of Insolvency decided that as to there having been breaches by the insolvent of the contract with Sutherland in 1896 and 1897, and as to the judgment debt resulting therefrom, the judgment in the Supreme Court was conclusive, but that the Court of Insolvency could inquire into the circumstances which led to this debt being incurred. That while the Court thought the insolvent had shown want of judgment and temper in abandoning his contract and risking a law suit for so small a dispute—½*d.* a bushel of wheat per acre for 16 to 20 acres, equal to, say 2*l.* or 2*l.* 10*s.*—still the Court thought that the insolvent believed he was maintaining his legal rights, and did not foresee or intentionally incur the heavy liability that followed from his act, and therefore that the failure of his estate to pay 7*s.* in the pound had arisen from circumstances for which the insolvent could not, in the opinion of the Judge, justly be held responsible within the meaning of sec. 139 of the *Insolvency Act* 1890. That as it was shown that the insolvent had no prospect of any property or income beyond mere labourer's wages, to require any substantial dividend would be either to permanently deprive the insolvent of his certificate or to put pressure on his friends to provide the necessary funds. That as the insolvent had been 12 months without his certificate he had been already punished for his ill-judged conduct. That as the opposing creditor was justified in submitting the facts to the Court of Insolvency, the payment of his costs should be a condition precedent to the issue of the order and certificate sought."

From this order of the Court of Insolvency the opposing creditor appealed.

Eagleson for the appellant—The facts, taken with the Judge's finding, show that the inability to pay 7*s.* in the pound arose from—(1) The insolvent entering into a contract of this

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kind without capital; (2) from his ill-judged conduct and temper. These are both matters for which he can be held responsible. Responsibility for failure to pay includes both responsibility for smallness of assets and responsibility for the largeness of the debts. Here the insolvent is clearly responsible for the latter. In any case it is for him to show that inability to pay 7*s.* has arisen from circumstances for which he cannot be held responsible. That he has not done.

He referred to *In re Dyte* (*a*); *In re Weston* (*b*).

[HOOD, J. referred to *In re Arnold* (*c*).]

Jacobs for the respondent—The Court had no power to make the payment of costs a condition precedent to issue of the certificate. If it was satisfied (as it was) that the failure to pay 7*s.* in the pound was due to circumstances for which the insolvent was not responsible, it was bound to grant the certificate unhampered by conditions.

[HOOD, J., referred to *Insolvency Act* 1897, sec. 10 (1).]

Counsel referred to *Ex parte Powell* (*d*); *Re Comyns & Williams* (*e*) [HOOD, J. That case shows you ought to have given notice of your appeal on this point]; *In re Friezer* (*f*).

A'BECKETT, J. This is a case in which an insolvent applies for a certificate and for dispensation with the condition that his estate should pay 7*s.* in the pound. The learned Judge thinks that he should obtain his certificate, that sufficient cause has not been shown for the refusal of the certificate, and that under the circumstances the inability of the estate to pay 7*s.* in the pound has arisen from circumstances for which, in the opinion of the Judge, the insolvent cannot be held responsible. What the Judge says upon that is that, as it is shown that the insolvent had no prospect of any property or income beyond mere labourer's wages, etc. (His Honor read from the reasons of the Court of Insolvency, *supra*), and "that as the opposing creditor was justified in submitting the facts to the Court of Insolvency,

(*a*) [1876] 2 V.L.R. (I.) 42, at p. 47.
(*b*) [1886] 12 V.L.R. 715, at p. 718.
(*c*) [1879] 5 V.L.R. (I.) 39.
(*d*) 1 State Reports N.S.W. 150.
(*e*) [1901] 7 A.L.R. 228.
(*f*) [1901] 7 A.L.R. 225.

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the payment of his costs should be a condition precedent to the issue of the order and certificate sought." Upon the matter of dispensation it is most material to observe that as to which freedom from responsibility has to be shown. It is not freedom from responsibility for the imprudence which led to his insolvency, but freedom from responsibility as to the insufficiency of his assets to pay 7*s.* in the pound. The cases referred to by counsel have been cases where there has been as to assets some reason why the certificate has been refused—something which makes the insolvent responsible for some waste or loss of assets. Now this man never had any assets, and beyond the wages he might earn by his labour he had no prospect of getting any. I therefore think that the learned Judge might rightly arrive at the conclusion that as to the insufficiency of assets he could not be held responsible. He has to meet a large debt caused by litigation in which he was defeated, and has nothing but his labour with which to pay it. The Judge says—"You are not justly responsible for not having enough assets to pay that debt." As to that, I think the Judge was quite justified in drawing the conclusion at which he arrived. As to his conclusion to give the creditor costs of this application notwithstanding his failure to persuade him to refuse the certificate, I see no reason to differ from the discretion which the Judge, who had all the facts before him, exercised. The only point left is whether the Judge had power to say—"Before I make this order I shall require you to pay these costs," which he has done by making the payment of these costs a condition precedent to the issue of the order. I think the Judge was right in the course he took. At all events, we see no reason for saying he had no power to do that which he has done. The appeal is against the order made by the Judge, and is unsuccessful. We think, therefore, the appeal should be dismissed, with costs.

HOOD, J. Sec. 139 of the *Insolvency Act* 1890 prohibits the grant of a certificate "unless it be proved to the Court that a dividend of not less than 7*s.* in the pound has been or will be paid out of the insolvent estate or might have been or might be paid except through the negligence or fraud of the assignee or

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trustee." That is clearly a reference to the assets of the insolvent. Then the certificate may be granted, or, rather, the condition of payment of 7*s.* in the pound may be dispensed with if the failure to pay it has arisen from circumstances for which the insolvent cannot, in the opinion of the Judge, be justly held responsible, still referring to his assets. The facts here, to my mind, show that the respondent was guilty of conduct which might or might not have brought him within other sections of the Act, but was guilty of no offence under this section. For that reason I concur in the judgment of A'Beckett, J.

HODGES, J. (dissenting). This is an appeal from the Judge of the Court of Insolvency, who granted under sec. 139 of the *Insolvency Act* 1890 a certificate and a dispensation with the condition of paying 7s. in the pound. The Act provides that such dispensation shall only be granted where it is proved to the satisfaction of the Court that the condition of things has arisen from circumstances for which the insolvent cannot justly be held responsible. The condition of things has been brought about by the insolvent on more than one occasion breaking his contract with his employer, and, as the Judge determines, by his want of judgment and his temper. Is that proof that the condition of things has arisen from circumstances for which he cannot justly be held responsible? I should have thought that proof that the condition of things arose from circumstances for which the insolvent could justly be held responsible. Therefore, in my opinion, the appeal should be allowed, with costs.

Appeal dismissed.

Solicitor for appellant: *Pincott.*
Solicitor for respondent: *Wighton.*

J. M.

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THE SISTERS GOLD MINING CO. NO LIABILITY *and Another v.* COTTON *and Others.*

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1903
October 5, 6, 7, 8, 12.

Mining—Parties to action—Association improperly incorporated—Trustee.

Cotton, who held certain water rights as trustee for a no-liability company, transferred such rights to one May, as trustee for the same company. May never became registered in respect of such water rights. Cotton subsequently transferred the same rights to Jacques, who obtained registration in respect of the same.

In an action brought by the company and May as trustee for the company against Cotton and Jacques it was proved that the company, not having 5 per cent. of its subscribed capital paid up, was not legally incorporated, and the Judge of the Court of Mines holding that the action not being maintainable by the company it could not be carried on by May alone as trustee, gave judgment for the defendants.

Held, upon appeal by the Full Court (HOLROYD and HODGES, JJ., A'BECKETT, J., dissenting), that the action could be carried on by the plaintiff May alone as trustee for those beneficially interested, although they were not parties to the action.

APPEAL from an order made by His Honor Judge Chomley sitting as a Judge of the Court of Mines for the mining district of Gippsland. The plaint was issued by The Sisters Gold Mining Co. No Liability and John Rogers May against Roland Augustus Cotton, Wallace Jacques, and James Baylis. It alleged that the defendant Cotton held and was registered for a certain water right and water race; that Cotton took up and became registered for the same for and on behalf and in trust for the plaintiff company; that on the 6th October 1902 Cotton as such trustee and holder, and with the consent of the plaintiff company, transferred such water right and water race to the plaintiff May, to hold the same in trust for the plaintiff company; that on 27th December 1902 Cotton, in fraud of the said trust, and without the consent of the company, transferred the water right and water race to the defendant Jacques, who on the same date became registered in respect thereof; that such transfer was illegal and a fraud upon the plaintiff company, and was invalid; that the plaintiff May, as trustee for the plaintiff company, was entitled to be and should be registered for and put in possession of the water right and water race; that the mining registrar should be directed to

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register the defendant May as trustee for the plaintiff company. A declaration was sought in accordance with the above statement and 500*l.* damages claimed. The case came on for hearing at the Court of Mines, before His Honor Judge Chomley. The defences set up at the hearing were--(1) No registration of plaintiff company; (2) neither the plaintiff company nor May had a miner's right at all necessary times; (3) no fraud or breach of trust on the part of Cotton. The defendant Jacques put forward among other defences the following:—That the defendant Cotton transferred to the plaintiff company only subject to the rights of defendant Jacques; that defendant Jacques had, at the request of the plaintiff company and of the defendant Cotton, spent large sums of money in respect of the water right and water race; that the plaintiff company was not duly incorporated, inasmuch as sec. 309, sub-sec. 1, of the *Companies Act* 1890 had not been complied with; that the action could not be maintained by either the company or May, as sec. 298 of the *Mines Act* 1890 had not been complied with; no miner's right at time when the cause of action first arose.

The certificate of incorporation of the plaintiff company was put in, but it appeared from the evidence that 5 per cent. of the capital had not been paid up. The evidence further showed that Cotton, who was at one time mining manager of the plaintiff company, had become registered in respect of the water race and water right, and had made a declaration that he held the same in trust for the plaintiff company, setting out the fact that he had acquired such rights with the money of the plaintiff company; he, Cotton, then transferred his rights to the defendant May, in trust for the plaintiff company, and, subsequently, May not having had himself registered, he, Cotton, transferred the same rights to the defendant Jacques. It is not necessary to set out the facts relating to the right, if any, that Jacques acquired by this transfer; but Jacques became registered in respect of these rights so transferred.

At the close of the plaintiff's case counsel for defendant applied for judgment, and on 20th May 1903 the Judge announced his decision as follows:—

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this case the defendants apply for judgment on unds, to which I shall refer in order: That the company has not been legally incorporated, as 5 of the subscribed capital had not been paid up prior tration. The first question that arises is what in this s the subscribed capital? According to the memo- lodged with the Registrar-General the number of ubscribed for was 30,000 of 5*s.* each, amounting to 7500*l.* ntended for the plaintiff that, taking the whole of this ndum together, its effect is that only 7150 shares have bscribed for, as the 22,850 held by J. T. Scott, legal r, in trust for shareholders cannot properly be said to be ed for; but, if that be so, the result would be that two- f the shares had not been subscribed for, as required by , which, by sec. 309, is applicable to no-liability com- nd the statement that 30,000 shares had been subscribed ld be false, and a fraud upon the Act—an interpreta- ich should not be adopted except on strong evidence. er, the directors, in collecting by means of cash and bills ange the exact sum of 375*l.*, which is five per cent. of showed that they recognized the necessity for that sum aid up; also the list of shareholders in the company's book between dates 17th January and 25th January hat all the 30,000 shares had been allotted. I find that ount of subscribed capital was 7,500*l.*, and the amount d to be paid up was 375*l.* It was urged for the plaintiffs s sum was paid up by the following items:—Cash, 100*l.*; exchange (Miss Newport, 112*l.* 10*s.*; Mrs. Hamilton, 0*s.*); and Adam McCracken, 50*l.*; bringing the total to The legal manager, May, said—'I regard the bills as s worth for their face value.' Fowler, one of the rs, says—'These bills were accepted by the company as Hanna, another director, says—'The bills given by rt, Hamilton, and McCracken I valued at their full face They were taken *bonâ fide* by the company at their face The bills were good for cash less discount at bank It is not explained how it came about that bills at months good for their face value were not discount-

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able on 12th March, and were dishonoured when due about 20th April, and after various efforts to enforce payment, successful only to the extent of 41*l.* 5*s.*, were ordered to be written off on 31st January 1901 as valueless. I cannot accept the statement that these bills ever were good for even anything approximating their face value. I find that the cash and bills referred to were not money or money's worth to the necessary amount of 375*l.* Next it is said that the mine and machinery, which was to be transferred to the company by Mr. Murrell, was 'money's worth' to much more than 375*l.* paid up to the company before registration. To this it is answered that there was no contract for the sale of this property prior to the registration; and second, that if there was, it being a contract partly for the sale of an interest in land, and not being in writing, it was not at the time of the registration an enforceable contract. I find that there was no contract for this sale but merely a nude promise by Mr. Murrell that if the promoters succeeded in forming a company he would sell to the company when so formed. The necessary 375*l.* was therefore not paid up in this manner. I find therefore that The Sisters Gold Mining Co. No Liability, is not an incorporated company, and is incapable of suing. Next, as regards the plaintiff May: in this action he claims only as trustee for and in virtue of the rights of The Sisters Gold Mining Co. That company is legally non-existent. His legal title to the water race and water right has not been completed by registration. There is no evidence that he has ever been in possession. He has at most an equitable claim to the water race and water right, and then only as trustee for such persons as may be beneficially interested in the assets of The Sisters Gold Mining Co. I do not think he can maintain such a claim in this action as the summons and plaint at present stand. Judgment for the defendants."

The counsel for plaintiff then requested the learned Judge to state a special case, but he refused, stating that they had their right to appeal. The defendants then applied to the Judge to fix the costs of the defendants, and the Judge adjourned the fixing of such costs to a future date to be fixed. The plaintiffs then applied for a stay of proceedings, which was

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and the Judge made this entry in his book :—" 20th May
udgment for defendants, with costs. Mr. Barrett and Mr.
ge apply to Judge to fix costs. Reserved. Execution
or 14 days."

ne 25th May 1903 the Judge, on an *ex parte* application
f of the plaintiffs, signed the following order, which was
on the defendants' solicitors on the same day :—" Upon
the evidence given on behalf of the plaintiffs and before
Mr. Finlayson and Mr. Eagleson of counsel for the
, and Mr. Barrett of counsel for defendant Cotton, and
hridge of counsel for defendant Jacques. This Court
er and adjudge judgment for the defendants. And this
oth further order and adjudge that the plaintiffs do pay
defendants their respective costs herein. And upon
ion of counsel for the said defendants respectively to fix
s the same is reserved. And this Court doth further
at execution be stayed for 14 days.

ven under my hand the 25th day of May 1903.

" A. W. CHOMLEY,
" Judge of the Court of Mines."

he 25th May, on the application of the solicitors for the
nt Jacques, the Judge fixed the 26th day of May for the
of hearing the parties on the question of fixing costs.
26th May the Judge, on an application by counsel for
endants, made without formal notice to the plaintiffs
er hearing the solicitor for the plaintiffs, and without
plication for an adjournment, set aside his order of the
ay, on the ground that such order was premature.
uently, on the 26th May, the Judge heard counsel for
nts and plaintiffs as to the principles upon which the
hould be fixed, and further adjourned such fixing to a
be fixed.

plaintiffs then brought this appeal against the order of
h May and also against the order of the 26th May. One of
unds of the appeal was " that the part of the learned
s judgment in which he ordered the plaintiffs to pay to
endants the respective costs of the action is bad and of

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no effect, inasmuch as the Judge did not at the hearing, nor at the time of pronouncing his decision, tax the costs of the suit on hearing; and, furthermore, because the amount of such costs do not form part of the order of such learned Judge."

F. Gavan Duffy, K.C. (with him *Eagleson*) for the appellants—The defendant Cotton held as trustee for the plaintiff company, and whatever title he possessed he transferred to the plaintiff May, as trustee for the same company, and May has a right to have it declared that this transfer is so held by him in trust. Even if the incorporation of the plaintiff company be invalid that will not affect the rights of the individuals composing the association. The plaintiff May holds the right in trust for those beneficially interested, and he has a right to have that trust declared and determined, even though the beneficiaries are not present: *Robertson* v. *Wealth of Nations Gold Mining Co.* (a). The name given is merely the firm's name, and it does not matter whether it is called a company or not; those beneficially interested choose to call themselves by that name, and the plaintiff May is entitled to sue as trustee for those calling themselves by that name. The appeal is substantially an appeal from the original order, and there was no necessity to draw up the order: *Reg.* v. *Quinlan, Ex parte Sampson* (b).

H. Barrett for the defendant Cotton; *Dethridge* for the defendant Jacques—The plaintiff May had no right in himself to sue in this action. He only purported to sue as trustee for a non-existent body. He had no legal title, because the legal title is in the defendant Jacques. Registration was necessary to complete the legal title, and May never did get registered. The action is framed as one in which a company is one plaintiff, and a trustee for that company is the other plaintiff. During the hearing it is proved that there is no such company, and so it must disappear from the action, and that leaves the plaintiff May alone suing as a trustee for a company that does not exist. The defendants can get no redress under such circumstances if costs are awarded in their favour. Then the appeal is prematurely brought; there is no order yet made by the Judge;

(a) [1888] 14 V.L.R. 594. (b) [1884] 10 V.L R. (L.) 102.

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the making of a final order was purposely postponed so that the costs could be fixed, because costs cannot be awarded unless fixed by the order. The defendants certainly did get the Judge to sign an order, but this was immediately cancelled by the Judge. Until an order has been made, there is no jurisdiction to entertain this appeal, because there is no order in existence from which an appeal will lie.

Duffy in reply.

HOLROYD, J. We are all of opinion that we have jurisdiction to entertain this appeal. No difficulty as to the costs of the defendants have been caused by the Judge not having fixed the amount of those costs immediately after the trial. We think that that is a matter which, if any injury has been done, may be remedied.

We think the appeal should be allowed. We are not so overwhelmed by the absence of the beneficiary as our brother A'Beckett is. It appears that Cotton, the registered owner of a water race and rights, has declared that he held the same in trust for a certain company calling itself The Sisters Gold Mining Co. No Liability; he transferred that right in the race to May, and under a declaration of trust, which is before us, he states the reason why he so transferred it, namely, because he took it up with money belonging to the company so describing itself as The Sisters Gold Mining Co. Subsequently to his having done this he chose to transfer that right and race to another person, and, so far as appears yet from the evidence, without any sufficient justification. He transfers to Jacques the very self-same thing as he had already transferred to May—he transferred to him that which he held as trustee for the company calling itself The Sisters Gold Mining Co. It turns out that the persons who obtained as a fact registration in that name were not authorized so to obtain registration, because the percentage of capital required by the Act had not all been paid up. But there they were, and Cotton held in trust for no one else. You cannot cut away Cotton's trust simply by saying that the company represented itself as a duly registered company when it was not. The effect of the improper registration is to make all

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the individuals of the so-called company liable, and there were means of bringing all the members of that company before the Court, if necessary. We think May should be in a position to establish his rights as against Cotton, and that he had a right, as against Cotton, who had transferred to him all his rights, to say that Cotton should not get anyone else registered. May may have been neglectful in not obtaining registration, and Jacques may have acquired some rights, but we think that May can sue and establish his rights, if any, against both of them. May was not deprived of that right by reason of the misfortune of being a trustee for persons who were not registered. There are equities existing which must be adjusted, and to make the matter straight the appeal should be allowed and set down for rehearing before a Judge of the Supreme Court. The plaintiff will have liberty to amend if he thinks proper by adding as plaintiffs the members of The Sisters Gold Mining Co.

HODGES, J. I agree that the appeal should be allowed. It was urged that the action should be dismissed altogether, because one of the plaintiffs, The Sisters Gold Mining Co., was not a duly incorporated company, and that, therefore, the only plaintiff was May. It was said that one plaintiff, claiming as he is claiming as trustee, should not be heard unless he has his *cestui que trust* joined with him. There may be cases where such a contention would be acceded to, but it seems to me in such a case as this it would be little better than a burlesque upon the administration of justice. May, the plaintiff here, claims under a transfer from the defendant Cotton; he says he claims as the transferee from Cotton, Cotton being a trustee for The Sisters Gold Mining Co., and the transfer being made to him as representing that company and as trustee for such company. Cotton afterwards purports to transfer to Jacques what he had already transferred to May, and when the case came on for trial he said:—"It is true I said I was a trustee for The Sisters Gold Mining Co., it is quite true I assigned as trustee for that company, it is true I was the manager of that company; but it is all a fiction, there is no such company, I really was no such trustee, and that is my defence to the action." In my opinion,

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r Cotton did, he did transfer, and when he attempts
t in fraud of his previous transfer to transfer again, it
ity of the Court to stop him.
defence which Cotton desires to set up can be set up
he plaintiff, but I concur in allowing an amendment to
if it is deemed fit by the plaintiff.
costs of this appeal and the costs of the original hearing
the discretion of the Judge who rehears the case.

CKETT, J. In this case I differ from the view, which has
cceptance with the majority of the Court, as to the
ursued by the Judge of the Court of Mines on the
taken when the case was closed. The proceedings
ced by a plaint in the Court of Mines asserting a right
gistered as to certain water rights and races that had
edly been acquired on trust for an association, as I will
body which was supposed to be a corporation. No
was held on trust for that association, and there had
informal transfer of those rights not perfected by
ion by May as trustee for the association. Then the
who transferred to May afterwards transferred the same
Jacques who is made a defendant, and a complicated
hip was disclosed in evidence, but so far as the
s case is concerned it showed that this lease was held on
r this association described as a corporation with no
It was alleged that in breach of this trust the rights
gned to May were assigned to Jacques, who had become
er, so as to displace May's title. The form of action
he corporation by the trustee, and May joined as plaintiff,
escribed as trustee for the association, and it has not set
interest apart from that which he holds for the associa-
e action is founded on the supposition that there are two
-the party beneficially interested, the corporation, and the
for the corporation, May. So the matter proceeds, and
the course of the proceeding evidence is given to show
ere has not been a valid constitution of the alleged
e body, and the Judge sustains that objection. This
s of opinion that he was right in coming to the con-

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clusion that the corporation did not exist. What is the consequence? The consequence is that an action purporting to be an action by a beneficiary and a trustee is an action by the trustee alone. In accordance with the rules as to parties the question is can that action go on, the beneficiary not being a party and the action being one begun by a beneficiary and a trustee? Can it proceed with the trustee alone? That is the view the Judge of the Court of Mines considered, and he decided that it could not go on. In his judgment he gives reasons for holding that the corporation does not exist.

[His Honor read the judgment of the Judge in the Court below, as to the finding upon this point.]

The Judge intimates in those words his readiness to accede to any proposition to restore the action in effect to the position as to parties in which it stood—that is, not only to have the trustee present as plaintiff, but also the beneficiary as plaintiff No suggestion is made, and as there is none he says that he must find for the defendant. I think he had no other alternative. I think the rule as to parties may sometimes work unfairly. In this case it may be that no harm would come of it, but, as a matter of law, the Judge was right, in my opinion. It is not a question simply of whether the party present is wrongly described as a corporation, whether the designation is right, but whether an action brought by two parties can go on and be carried on by one. Counsel urged that a two-legged action can proceed as a one-legged action, and relied upon the decision in *Robertson* v. *The Wealth of Nations G. M. Co.*, but there the double character of the claimant was recognized, and the pleadings were put right by having on the record the persons who represented the association. The action here was reduced to that maimed condition, I do not think it could go on in that maimed condition, and I find it difficult to see how the absence of this beneficiary, recognized as a necessary party, can be supported.

Solicitor for the plaintiffs: *Brayshay.*
Solicitor for the defendants: *Wilkinson.*

W. H. M.

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[IN CHAMBERS.]

HODGES, J.

1904
April 19.

BEAR *v.* GARLINGE.

Practice—"Rules of the Supreme Court 1884*"—Order III., r.* 6*—Specially indorsed writ—Debt or liquidated demand arising under a contract—Deposit money on contract to purchase land.*

The plaintiff indorsed a writ under Order III., r. 6, with a claim to recover the sum of 1000*l.*, which the defendant in a contract for the purchase of land agreed to pay as a deposit "upon the acceptance of this offer." The offer was accepted.

Held, that this was not a debt or liquidated demand arising under a contract within the meaning of Order III., r. 6, and was not the subject-matter for a specially indorsed writ.

THIS was an application made on behalf of the plaintiff for leave to sign final judgment under Order XIV., r. 1.

The writ was indorsed as follows:—

"The plaintiff's claim is for money due from the defendant to the plaintiff under an agreement in writing dated the 2nd day of February 1904, made between the parties.

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"Feb. 2nd. To amount of deposit due this day under agreement for sale to you of plaintiff's property known as 'Triton,' 1000*l.* Amount claimed, 1000*l.*

"The plaintiff also claims payment of interest on the said sum of 1000*l.* from the 2nd day of February 1904 till judgment at the rate of 4½ per cent. per annum, being the rate mentioned in the said agreement."

The affidavit in support of the application set out the contract, which, so far as it is material to this report, was as follows:—

"Feb. 2nd 1904.

"Mr. W. Brisbane.

"I hereby offer to purchase Mrs. E. M. Bear's property, as inspected by me to-day, situated at Crib Point, containing 400 acres of land or thereabouts, together with all improvements erected thereon, for the sum of three thousand pounds (3000*l.*), on the following terms:—1000*l.* deposit on acceptance of offer,

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and the balance in 4 equal yearly payments, payable in 2, 3, 4, and 5 years respectively from date of contract, together with interest thereon at the rate of 4½ per cent. per annum, payable half-yearly.

"T. GARLINGE.

"I hereby accept the above offer, and authorize W. Brisbane to accept a deposit.

"Feb. 2nd 1904. EMMA MAY BEAR."

There was no affidavit filed by the defendant in reply.

W. H. Moule for the plaintiff in support of the summons—The question involved in this application is whether the claim on this writ is the subject of a special indorsement under Order III., r. 6—whether it is "a debt or liquidated demand arising upon a contract." The defendant has agreed to pay 1000*l.* upon the plaintiff's acceptance of the offer, the plaintiff has accepted the offer, and the defendant has become liable to pay the 1000*l.* The defendant has not definitely repudiated the whole contract of purchase. The only condition attaching to the payment of the money was the acceptance of the offer; that condition has been fulfilled, and therefore a liquidated demand under a contract has arisen. The question of the plaintiff making or showing title does not arise; she need not yet tender a conveyance, because the sum sought to be recovered is merely the deposit money. This point was decided this year in a case of *Harrison* v. *Splatt* (unreported) by Hood, J., who held that in a contract for the purchase of land the agreement to pay a definite sum upon a date fixed was within Order III., r. 6, and the learned Judge refused to follow the case of *Leader* v. *Tod-Heatley* (*a*), in which Stirling, J., expressed a view to the contrary.

Lewers for the defendant to oppose—The plaintiff can sue either for specific performance of the whole contract, which is not the subject for a specially indorsed writ, or for damages for breach of the contract, which admittedly cannot form the subject of such indorsement. The principle laid down in *Leader* v.

(*a*) [1891] W.N. 38.

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Tod-Heatley is correct; the plaintiff cannot retain the land and at the same time sue for the payment of the purchase-money: See *Laird* v. *Pim* (*b*). The authorities are clear that the right of action involved in this case is one for damages for breach of contract.

[HODGES, J. I will refer this to the Full Court if it is so desired, but I am of opinion that the plaintiff cannot succeed upon this application.]

Moule—The plaintiff would prefer to have the application dismissed, and the summons turned into a summons for directions.

HODGES, J. In this case the plaintiff has agreed to sell, and the defendant has agreed to buy from the plaintiff, a certain piece of land. By the contract it was agreed that the sum of 1000*l.* should be paid as deposit upon the plaintiff's acceptance of the offer. The offer was accepted, and the plaintiff now sues for the 1000*l.*, which was not paid as agreed, and asks that she may have judgment signed under Order XIV., r. 1. The writ purports to be specially indorsed under Order III., r. 6, and judgment is asked for on the ground that this is an action to recover a debt or liquidated demand arising under a contract within the meaning of Order III., r. 6. In my opinion this claim does not come within that rule at all. There is no doubt that in a certain sense the action is brought to recover a sum fixed as to amount, but in my opinion it is not "a debt" within the meaning of that rule. There is an obligation to pay on the one side, as there is an obligation afterwards on the other side to show title. The illustrations given in rule 6 themselves show that this is not the kind of debt or liquidated demand contemplated. (His Honor read the rule.) Those are cases in which the whole thing has passed from the one party, and nothing remains to be done by the other party except to pay. That does not apply to a case like this, where the plaintiff retains possession of the land, and where ordinarily the title will not be parted with until all the purchase money has been paid. The purchaser contracts that he will pay in a certain time by certain

(*b*) [1841] 7 M. & W. 474.

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instalments, but the non-payment of these sums is not a matter which entitles the vendor to recover them in a summary way. Practically that would be asking to have the contract performed piecemeal: first he desires to bring an action to recover the amount of the deposit, next he would want to recover one of the instalments of purchase-money, and so on, and so gradually get specific performance of the contract by a series of actions under one and the same contract. I do not think that that was ever contemplated by these rules. If the defendant repudiates the contract, then the plaintiff is entitled to damages, but the measure of such damages would not be the whole amount of the purchase-money under the contract. It is not necessary in this case to say what would be the effect of a contract containing a provision that the sum deposited was to be ascertained or liquidated damages in the event of the purchaser not performing the contract. That is not the case here. The application will be refused, but without costs.

Solicitors for the plaintiff: *Blake & Riggall.*
Solicitors for the defendant: *Malleson, England & Stewart.*

W. H. M.

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1904
March 8, 9.

KELLY *v.* THE MAYOR, ETC., OF FITZROY.

The Local Government Act 1890 (*No.* 1112), *ss.* 246, 277—*The Local Government Act* 1891 (*No.* 1243), *ss.* 56, 60—*Rateability—Premises used as primary school—Exclusive use—Notice of appeal, rates—Amendment of notice of appeal —New case raised—Justices Act* 1890 (*No.* 1105), *s.* 185.

The appellant was rated in respect of buildings which were used by day as a primary free school. The buildings were, however, used almost every night for concerts and meetings of societies connected with the church which had the conduct of the school classes. No charges were made by the appellant for such use.

Held, that the buildings were not "used exclusively for the purposes of any primary school" within the meaning of sec. 246 of the *Local Government Act* 1890 as amended by sec. 56 of Act No. 1243, and were rateable.

There is no jurisdiction at the hearing of a rate appeal to allow a notice of appeal to be amended so as to raise a new case.

CASE STATED by a Judge of the County Court.

E. J. Kelly was rated in respect of Presbytery and school-house at Nicholson-street, Fitzroy, the former being assessed at

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., and the latter at 218*l.* He appealed to the County Court, ging in his notice the following grounds of appeal:—

1. Exemption from rating of the portion A of the said perty, and which is described as "schools," as being premises exclusively for the purposes of a primary school in which ation is given free to the scholars.

2. Exemption from rating of the portion B of the said erty, and which is described as "Presbytery," as being part place used exclusively for public worship.

3. Unfairness in the valuation of the said property.

4. Incorrectness in the valuation of the said property.

5. Unfairness in the amount assessed on such property.

6. Incorrectness in the amount assessed on such property.

Judge Johnston heard the appeal, and at the close of the llant's case application was made to amend the notice of al by claiming that the property was under the exemption c. 246 of the *Local Government Act* 1890 in favour of lands exclusively for charitable purposes.

The amendment was allowed.

The learned Judge held that the premises were not used usively for charitable purposes, and he upheld the rate as to Presbytery, but reduced the assessment to 175*l.* His Honor d, as to the school, that the building was used almost tly for charity concerts, bazaars, friendly society meetings, mutual improvement society meetings, but without any nent of rent, and he quashed the rate in respect of the ol, but assessed it provisionally at 200*l.*

Duffy, K.C. (with him *Hogan*) for the appellant—The nty Court had power to amend the notice of appeal, and we now entitled to raise the general exemption of lands used charitable purposes: *Justices Act* 1890, secs. 128 (ii.), 185.

Isaacs, K.C.—There is no power to amend the notice of al.]

There is power under the *Justices Act* 1890, sec. 185, to make amendment asked for: See also sec. 128 (11) of that Act.

The following judgment was then delivered upon this point:—

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MADDEN, C.J. We are of opinion that the amendment cannot be made. Sec. 277 of the *Local Government Act* is exceedingly distinct on the subject of this appeal, and the terms on which it may be had, and for reasons easily understood. Sec. 277 provides—"If any person think himself aggrieved . . . . he may at any time within one month give notice of his intention to appeal to the next Court of General Sessions . . . . but no such appeal shall be entertained at such Court unless fourteen clear days' notice in writing of such appeal stating the nature and grounds thereof be given by the aggrieved party to the Council of the municipality." It is true that there is a clause providing that the rate may be recovered at once, notwithstanding the appeal, and the reason is that the local body requires to know what its revenue will be and upon what amount of money it can rely. It is very important that it should know within a limited time what is to be the history of a given rate, because, though recovered, it may have to be handed back, and, in order that it may be able to deal with the matter within the time contemplated, it must have distinct notice, so that it may deal with the matter then and there. It must not be strung up indefinitely. When the case came on, the notice stated some ground, in compliance with the Statute, but did not state the ground now sought to be relied upon. It is said that when the case came before the Court it had authority to amend the appeal by adding a new ground altogether.

To begin with, the addition of such a new ground would be in contravention of the spirit of sec. 277, if not of its words. It is said that there might be a case of an appeal, for instance, in which no ground was stated, and it is suggested by counsel that it would be legitimate for the Court, at the hearing, to allow the appellant to amend by stating grounds. That would be to distinctly defeat sec. 277, and there is no express authority which would authorize the Court to do that at the trial which had to be done at least fourteen days before. It is said that an adjournment might be made. There is no authority to adjourn, and adjournment would defeat the purpose which is obvious enough by sec. 277. It is said that sec. 185 of the *Justices Act* would allow this amendment to be made, and that the general

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terms of that section overcome the more specific terms of sec. 277. It provides—"Every Court of General Sessions shall have power to amend at any time and at any stage of the proceedings any affidavit notice record decree judgment order writ præcipe process or other proceeding used before or in such Court in any matters which appear to such Court not likely to mislead . . . . and to impose such terms and to award such reasonable costs of such amendment as it thinks fit." That would seem to contemplate the amendment of an existing notice, for instance, and the amendment is to be given in those cases only to such an extent as is not calculated to mislead, and adding a new ground would not come within the literal terms of that section at all. The general section which authorizes justices to amend is exceedingly comprehensive; not only have they the power, but they are required to make amendments to meet the justice of the case. Making a new case would not be contemplated as included in the jurisdiction to amend formerly. I do not know whether that section would make any difference, but the principle decided in this Court was, although there was formerly a general power to amend, no amendment was permitted which raised a new case. This clearly would raise a new case, and for those reasons we think the amendment cannot be made now, and ought not to have been made by the County Court.

Isaacs, K.C. (with him *Dethridge*) for the mayor, &c., of Fitzroy—The school buildings are exempt wherever they are used exclusively for the purpose of any primary school in which education is given free to the scholars: Sec. 246 of Act No. 1112, as amended by sec. 56 of Act No. 1243. The evidence shows that these buildings were constantly *used* for other purposes. The case of *Purvis* v. *Trail* (*a*) establishes the principle that if a building is used as a fact for any other purpose than that which gives the exemption it may be rated, and the exemption cannot be claimed: *Castle on Rating* (3rd ed.), pp. 39, 40; *Commissioners of Inland Revenue* v. *Forrest* (*b*); *Cemeteries Committee* v. *Commissioner for Valuation* (*c*).

(*a*) [1849] 3 Ex. 344. (*b*) [1890] 15 App. Cas., at p. 340.
(*c*) [1897] 2 Ir. R., at p. 170.

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Duffy—There has been no use of a beneficial character, no use which is inconsistent with the use of the buildings for educational purposes, and no money has been received for the occasional temporary uses to which the buildings have been applied: *Trustees of Victorian Rifle Association* v. *Williamstown* (*d*); *Disney* v. *Williamstown* (*e*). The trustee of these buildings gets no benefit from the extraneous use of them, and the case comes within the principle enunciated in *Mayor of Sale* v. *Bearup* (*f*), in which the occasional user of a paddock surrounding a church was held not to alter the exemption.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HODGES and HOOD, JJ.] The only question which remains for determination here is the question whether the school, the subject of the appeal, is or is not rateable property. Sec. 246 of the *Local Government Act*, as amended by Act No. 1243, provides that—"All land shall be rateable property," except, amongst other things, "any land or premises used exclusively for the purposes of any primary school in which education is given free to the scholars." In the present case, the school was erected as a primary school, and was in a large degree, perhaps mainly, used for primary education within the meaning of the Act. In addition to that, it is shown by evidence that concerts for charitable purposes are held in the school-house; that a bazaar is held annually for the benefit of the school; that some of the parishioners (a branch of a Catholic friendly society) hold meetings fortnightly in the school-hall; and that some Catholic Young Men's Societies, for mutual improvement, also meet there.

The learned Judge, in the first place, finds that the place is not rateable, because it was exclusively used as a primary school, where education was free to the scholars. His Honor finds specially this fact in dealing with the authorities cited to him. He went on to say—"One or other of these things is of almost nightly occurrence. They take place presumably by the permission of the trustees, but no rent is paid. I view these

(*d*) [1890] 16 V.L.R. 251. (*e*) [1888] 15 V.L.R. 59.
(*f*) [1890] 16 V.L.R. 658.

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persons merely in the light of guests. I do not think I ought to conclude, from the fact that the trustees permit these things at hours when the building is not wanted for school purposes, that they, the trustees, are thereby using the premises for other than school purposes. For these reasons I quash the rate in respect of the school premises."

The nature of the exception is very clearly cut in sec. 246, as amended, and although that is so, we think that some slight departure from the use which is the subject of the exception might as a matter of fact be interpreted as not altering the nature of the tenement which is the subject of the exception, as, for instance, if people were allowed once in a way to occupy the school, that would not substantially alter the purpose in respect of which it is excepted from rating by the Act. It is said that these various and becoming uses are applied to this building almost nightly, and, when so much appears, that then the building is brought within the series of authorities relied on in the Court below. It has been held it is not a question of whether the trustees of the building receive rent for such purpose, or whether rent could be received by them or by anybody for them, or whether the money received by them from concerts will be applied to the main purpose for which the building exists. The question which does determine rateability is whether there is any beneficial occupation for value, whether for comfort or utility, or whether money is involved. If any of these things, then it is rateable, unless it falls exclusively within the exception. We think in the present case the evidence shows that the use of the school was a beneficial occupation other than that of a primary school. The ways in which it was used show a very substantial occupation. It would be impossible to say that the building has been exclusively used as a primary school. We therefore think that the learned Judge's view was erroneous. It is impossible to say these persons were all guests in some way, such as they would be guests if they were invited in to take shelter from a thunderstorm. They are persons who undoubtedly used it for purposes of benefit for their own business, although they paid no rent for it. We therefore think the assessment was right.

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We were also asked to express an opinion on the observations of the late Chief Justice in *Rifle Association* v. *Mayor, etc., of Williamstown*, that the test was whether the person who was trustee could use it for his own advantage in any way. We do not think that is the position. The question is whether there is any beneficial occupation by the consent of the owner, or by the owner, whether he does or does not get money for it, or whether he could get money for it. We will therefore direct that the judgment below be so far altered as to hold that the school-house is rateable. We do not interfere with the reduction of the assessment which the learned Judge arrived at. We think the appellant below is entitled to retain the costs allowed him below, but there will be no costs of this appeal.

Judgment varied.

Solicitor for the ratepayer: *E. E. Dillon*
Solicitors for the Council: *Lewis, Hedderwick & Fookes.*

W. H. M.

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March 1, 3, 4.

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P.C. Privy Council. 21. T.L.R. 522. 1905 A.C. 273.

Trustee—Breach of trust—Trustee following solicitor's advice—Negligence of trustee's solicitor—Payment by trustee to persons not entitled—Liability of trustee—Jurisdiction of Court to relieve trustee from personal liability—"Acted reasonably"—"Ought fairly to be excused"—Trusts Act 1901 (*No.* 1769), *s.* 3—*Practice—Parties—Assignment of trust fund by way of mortgage—Accounts of money owing under mortgage—Representative of assignor's estate—Joinder of parties to whom defendant trustee asserts that trust fund was wrongfully paid by him—Stamps Act* 1890 (*No.* 1140), *ss.* 59 (2), 68—*Mortgage containing acknowledgment of receipt of money—Stamp duty—Admissibility in evidence for limited purposes.*

In 1876 M. F. died intestate, having a vested interest in remainder in a trust fund of personalty, and leaving surviving her two children and her husband, J. F., who administered to her estate and became beneficially entitled to the whole of such interest. In 1891 J. F. assigned to the plaintiff, by way of mortgage (*inter alia*), the whole of his interest in his wife's estate to secure the sum of 650*l.* with interest thereon at 20 per cent., and notice of this assignment was given to the trustees of the fund. In 1894 J. F. died intestate, and no

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representative of his estate was appointed. In 1897 the tenant for life of the trust fund died. In 1898, letters of administration of the estate of M. F., left unadministered by J. F., were granted to the defendant company, which was also one of the trustees of the fund. In 1899 the trustees of the fund paid one-third of the trust fund into Court, alleging that the validity of the assignment and the amount owing thereunder were in dispute, and paid the remaining two-thirds to the defendant company, as administrator *de bonis non* of M. F.

The plaintiff claimed this latter sum as against such trustees or alternatively as against the defendant company as such administrator.

In its defence the defendant company pleaded that the moneys received by it were, under the advice of solicitors, paid to the two children of J. F. and M. F.

It was proved that a sum considerably greater than the whole of the trust fund was owing to the plaintiff under the mortgage.

Held that, as there was no possibility of there being a surplus of the trust fund over the amount of the debt owing to the plaintiff under the mortgage, there was no necessity for an account to be taken as to how much was owing to him by the mortgagor, and no necessity for a representative of the estate of the mortgagor to be joined as a party.

Held also, that the two children of J. F. and M. F. were not necessary parties to the claims made by the plaintiff, and that, if they became necessary parties by virtue of the defence raised, the defendant ought to have applied to have them added.

Held also, that the plaintiff was entitled to recover the money claimed against the defendant company as such administrator.

In order that a trustee may be relieved under sec. 3 of the *Trusts Act* 1901 from personal liability for a breach of trust, it is not sufficient for him to satisfy the Court that he has acted both honestly and reasonably; but he must also satisfy the Court that in all the circumstances he ought fairly to be excused.

Where a trustee has acted both honestly and reasonably, but has committed a breach of trust, and, after knowledge thereof, allows time to pass on, circumstances to change, and the trust estate to lose in respect of such breach of trust through want of action on his part, he ought not to be relieved under sec. 3 of the *Trusts Act* 1901 from personal liability for such breach of trust.

An indenture of assignment by way of mortgage contained the following words:—"In consideration of the sum of 650*l*. the receipt whereof he doth hereby acknowledge the said mortgagor doth hereby assign &c." The indenture was unstamped. Below the signature of the mortgagor to the indenture was a stamped receipt by him for the 650*l*.

Quære, whether the receipt in the body of the indenture required a stamp.

Held, that the document was admissible in evidence as a mortgage, and for the purpose of showing that the mortgage was to secure a certain sum.

The decision of A'Beckett, J., *supra*, at p. 399 *et seq.*, affirmed.

APPEAL by the defendant company from the decision of A'Beckett, J., reported *supra* at p. 399 *et seq.*, where the facts fully appear. The facts are also fully set out in the judgment of Madden, C.J. (*infra*).

Sec. 3 of the *Trusts Act* 1901, referred to below, provides as follows:—

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"If it appears to the Supreme Court that a trustee is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach then the Court may relieve the trustee either wholly or partly from personal liability for the same. The administration of the property of a deceased person whether a testator or intestate shall be a trust and the executor or administrator a trustee within the meaning of this section."

The following arguments are additional to those which appear from the report of the case *supra*, at p. 403 *et seq.*:—

Higgins, K.C., and *Weigall* for the defendant company, appellant—It is the usual practice to stamp the receipt in the body of a mortgage, and this practice is recognized by the *Stamps Act* 1890 to the extent that where an instrument acknowledging the receipt of money is stamped the Act exempts any additional receipt on the instrument from stamp duty.

[MADDEN, C.J. Does the acknowledgment of the receipt of money in the body of an instrument amount to anything more than a recital of the receipt at the foot of the instrument?]

It is not essential, but it may simplify proof.

[*Isaacs, K.C.*, referred to *Tidyman* v. *Collins* (*a*) and *Black* v. *Zevenboom* (*b*).]

The statement of claim claims against the trustees of McDonell's will for breach of trust in paying the money to the administrator *de bonis non* of Mary Fraser's estate, or alternatively against the latter payment of such money. A'Beckett, J., has gone beyond that, and has visited upon the latter the consequences of what he says is a wrongful payment to outsiders —namely, John Fraser's children—as to which there is no allegation in the statement of claim, which assumes that the money is still in the hands of the defendant company.

[HOOD, J. Your own defence sets up that you paid the money to these children.]

But that is not alleged as a breach of trust. If it had been said that the defendant company as administrator had wrongly paid the moneys away, then we could have joined the persons,

(*a*) [1878] 4 V.L.R. (L.) 478. (*b*) [1880] 6 V.L.R. (L.) 473.

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who are said to have wrongly received it, as third parties. The case against the defendant company as administrator is merely based on the principle that he who receives money wrongfully is equally liable with the man who has wrongfully paid it to him. An action for accounts was the proper form of action here. In the place of ordering accounts, A'Beckett, J., has ordered the payment of a specific sum of money to the plaintiff, with interest. On an account being taken, it might be found that there was nothing owing. There is nobody before the Court who had any knowledge of the relations between the deceased, John Fraser, and the plaintiff. The only evidence that the mortgage debt is still owing is that of the present liquidator of the plaintiff company, who says there is no evidence in the company's books of the debt having been paid; while there is evidence that the former secretary of the company absconded after misappropriating a large sum of its money. Moreover, in addition to this interest under McDonell's will, the plaintiff had assigned to it two policies of insurance on John Fraser's life, which, if collected, should have been sufficient to pay the whole of the debt to it and interest. How is a trustee to know how much he is to pay to the mortgagee of a beneficiary's interest? There is nobody here to represent the deceased mortgagor in the taking of accounts as between him and the mortgagee. The English authorities show that, although a trustee may, in many cases, with perfect safety to himself, pay the money over to the mortgagee, still he must know what the mortgagor has to say about the matter.

[HODGES, J. A'Beckett, J., says those cases are only applicable where the trustee is in doubt as to whether there will be a surplus, and that there can be no such doubt here.]

The Court should take into consideration the fact that for years the persons claiming through the mortgagor have intimated that there would be something to say at the proper time as to this money being paid over to the mortgagee. The question is not one solely of parties; it is, according to the decisions, a question of right—Has the mortgagee the right to put the trustee in such a position? As to sec. 3 of the *Trusts Act* 1901, a man may act honestly, and from a business point of

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view reasonably, and still the Court may fairly come to the conclusion that he ought not to be excused, because he should have gone to a solicitor. Negligence is not the only thing to be regarded in determining reasonableness, but what is to be regarded is whether the trustee gave plenty of attention to the matter, took reasonable precautions, looked at it as a reasonable man, and so on: *Cf. In re Grindey* (c). The defendant company clearly acted honestly, and, having taken legal advice, must be said to have acted reasonably, and is therefore protected by the section.

[HODGES, J. Is not the negligence of the solicitor's advice a factor to be considered ?]

The Court would really then be called upon to determine whether an action for negligence would lie against the solicitor, which it could not possibly do with the materials before it. If an action for negligence were brought by the trustee against the solicitor, it would be necessary first of all to prove *damnum*. Supposing a trustee were to succeed in getting damages from the solicitor, in a subsequent action against him (the trustee) by the *cestui que trust* he might be found not liable. Again, the test whether the solicitor who gives the wrong advice is able or liable to recoup the estate is not workable: *Cf. In re Smith, Smith* v. *Thompson* (d). In that case, although the solicitor might have been liable to the trustee, still the trustee was held not liable. There is no remedy on the part of the defendant company against the children of John Fraser, while there is on the part of the plaintiff. In the case of a payment to a wrong beneficiary, the proper payee may follow the fund: *David* v. *Frowd* (e). Where a trustee has acted up to the highest standard of duty, or has done everything that even the most nervous *cestui que trust* could require of him, he is not to be made personally liable. One element in the consideration as to whether the trustee has acted reasonably is the skill and experience of the solicitor whose advice is taken. Here the defendant company made a careful choice of its legal advisers, and there is nothing more it could in reason be expected to have

(c) [1898] 2 Ch. 593, per Chitty, J., at p. 601.
(d) [1902] 71 L.J. (Ch.) 411.
(e) [1833] 1 Myl. & K. 200.

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done. Having got the best advice, it was its plain duty to act upon it, and consequently it should not be made personally liable if it should afterwards turn out that a pure mistake of law has been made. Another element to be considered is, whether the mistake made was an egregious one or one near the border line. The Court has to determine whether the advice obtained was that which a prudent, reasonable man would act upon. Even if the result of the Act, in absolving trustees from liability, is to absolve solicitors who have given negligent advice, that is a necessary consequence of the Act, and should not deter the Court from giving the fullest effect to it. All the English cases in which a trustee has been held liable are cases in which it has been held, for some reason or other, that the trustee had not acted reasonably, as, *e.g.*, where legal advice was not taken; or where a solicitor acted as a valuer; or where a trustee left everything to a solicitor co-trustee. In the case of *In re Stuart* (*f*) a distinction is drawn between the case of a man acting as a valuer and acting as a legal adviser. A'Beckett, J., says in effect that, "although the defendants acted reasonably from their point of view, still the breach of trust was of the worst kind so far as the beneficiary was concerned." The Legislature did not intend it to be discussed from whose point of view the breach of trust was reasonable. "Reasonably" in sec. 3 means reasonably as trustees: See *In re Grindey* (*g*). The defendant company was authorized to obtain administration by E. J. Fraser under sec. 4 of the Act No. 938, the private Act of the company. Under that Act the company is entitled to certain commission, and is also entitled to the proper expenses attendant on the performance of its duties as such administrator. These have not been allowed by A'Beckett, J.

Counsel also referred to *Jervis* v. *Wolferstan* (*h*); *Chapman* v. *Browne* (*i*); and *Underhill on Trusts and Trustees* (5th ed.), 388.

Isaacs, K.C. (with him *Guest*), at the request of the Court, confined his argument to the question only of the right of the

(*f*) [1897] 2 Ch. 583.
(*g*) [1898] 2 Ch. 593, per Chitty, L.J., at p. 601.
(*h*) [1874] 18 Eq. 18, 25.
(*i*) [1902] 1 Ch. 785.

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defendant company to expenses and commission as administrator *de bonis non* of Mary Fraser.

Higgins, K.C., in reply.

MADDEN, C.J. In this case the questions which have arisen are somewhat complicated, but are not very difficult when examined closely with the advantage of the light thrown upon them by the arguments. One Roderick McDonell died in 1858, having made a will which directed that all his property should be converted into money, that one-fourth of it should be paid to his wife, and that the other three-fourths should be invested and the income paid to his daughter, Anne Howe, during her lifetime. Probate was granted to John McDonell, and when he died two trustees were appointed in his place. Anne Howe had six children, one being Mary Grace Howe, who married John Fraser on 22nd July 1872. Two children of that marriage were born, and continue to survive. On the 8th July 1876 Mary Grace Fraser died, and on 24th August 1876 John Fraser, her husband, was appointed the administrator of her estate. In 1889 one of the trustees of McDonell's will died. On the 6th February 1891 John Fraser, by a deed which is in evidence, assigned by way of mortgage all his interest, whether as a beneficiary under or as administrator of his wife's estate, in her interest under her grandfather's will to the plaintiff company. On the 10th April 1891 notice of this assignment was given by the plaintiff company to the surviving trustee of Roderick McDonell's will. On the 19th June 1894 John Fraser died intestate. On the 8th July 1895 the defendant company and Walter Madden were appointed trustees of McDonell's will, the surviving trustee having become insolvent, and thereby became the constituted representatives of McDonell's will. On the 18th December 1897 Anne Howe, the life tenant under McDonell's will, died. At that time she had had six children who had attained the age of 21 years, and each of them was entitled to one-sixth of that share of McDonell's estate of which Anne Howe was the life tenant. On the 28th March 1898 administration *de bonis non* of the estate of Mary Grace Fraser

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nted to the defendant company. On the 14th June 1898 was given to the defendant company on behalf of the f company of the assignment of John Fraser's interest to intiff company. That notice was given to the defendant y after administration *de bonis non* had been granted to before it had parted with the money which is the subject action. During 1898, in consequence of that notice, and questions arising under it, Walter Madden, as manager of fendant company, consulted the solicitor to McDonell's as to what was the proper method of division of the y of Mary Grace Fraser. That solicitor advised erron- that John Fraser was entitled to one-third, and the two n of John and Mary Grace Fraser to the remaining two- It appears that subsequently those two-thirds were paid those two children under that advice. Thereupon this was brought against the defendant company and Walter n, as trustees of the will of McDonell, and also against fendant company as administrator *de bonis non* of the of Mary Grace Fraser. The statement of claim sets out acts in effect, and claims against the defendant company alter Madden personally and as trustees of McDonell's alternatively against the defendant company as adminis- *de bonis non* of Mary Grace Fraser, payment of 673*l.* 18*s.* d interest.

first objection with which we have to deal is that this s not properly constructed, because, it is said, the repre- ves of John Fraser, the mortgagor, and also his children, sons to whom the money was paid over, ought to be before urt. It is also said that all that is claimed here is pay- of this money as against the defendant company and Madden, or as against the defendant company as strator *de bonis non*, on the ground that the defendant ny and Walter Madden, as trustees of the will, ought to aid this money to the plaintiff company under its assign- f John Fraser's interest, and that the defendant company, inistrator *de bonis non*, had wrongfully received it, and re ought to account for it and pay it over to the plaintiff ny as such assignee. It is said that because, as a matter

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of fact, John Fraser is not represented in the su
two people to whom the money was paid ove
defective for want of parties. It is said that t
equitable insistence on the part of the defendan
they had been joined, the defendants would ha
better position to adjust the rights of all parties t
possibly be in the suit as it is. But it appears
suit is well enough as it stands, as far as the p
cerned. It puts forward this claim:—"You, the
notice of our claim, and you ought to have paid th
and to nobody else. You, the defendant compan
trator, got notice of it before you had parted wi
and therefore should have paid it to us. One o
ought now to account to us for the money." I
perfectly good pleading. It would rest upon the
set up such an answer as might display the plain
and compel him to retire for repairs—to amend, i
go on—and then give the best answer they cou
put forward their own claim. The defendant
that. It pointed out that what it did was to p
money to the children of John and Mary Grace Fr
it relies upon the *Trusts Act* 1901 (No. 1769), w
protects it, having regard to what it did. We t
that, in a strict and regular course of pleading, th
in the objection at all. So far as the defenda
barrassed, they ought to have taken out a sum
ordinary way, and they might have got some relie
it seems that the plaintiff took up its logical groun
defendants to set out the debatable matter so far
able. It was no concern of the plaintiff company
money. Its money is gone, and it sets up its clai
the defendants, or alternatively against the defend

The next point is this: The plaintiff's claim
deed of assignment by way of mortgage. In its be
the ordinary avowal that the money, which is the
for the deed, is thereby acknowledged to have b
the ordinary formula in which a well-drawn deed
was no stamp upon that part of the deed. At

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the regular receipt was drawn up for the consideration y, and that was duly stamped. It was contended that the tiff's title was bad, because it had a deed which was a ot, and which was not duly stamped—that is to say, that the l receipt in the body of the deed ought to have been ped just as the receipt at the end was in fact stamped. think that that contention is bad, and that the deed is ctly good. It may be doubtful whether an acknowledg- in the body of a deed of the receipt of money, which nly to facilitate title in a Court, is such a receipt as ntemplated by the *Stamps Act*. But if it is, the fact that able consideration was given could be proved by some usic evidence. The fact that such acknowledgment is not ped certainly would not have the effect of invalidating the as an assignment by way of mortgage.

he next point raised was that, assuming everything else e plaintiff's favour, the plaintiff had no right to come e defendant company as administrator *de bonis non*, or e defendants as trustees of the will, and say—"Here is deed; here is my authority to receive and to give a pt for the money which belonged to Fraser. I demand you shall pay that money to me." They say that is enough; that if the plaintiff makes a demand, they may, disposed, accept the plaintiff company's receipt, which be a sufficient protection to them; but that, according e authorities which have been cited, both before A'Beckett, nd before this Court, they are not bound to accept that pt. The cases which have been cited do establish that as oad principle, but they assert that principle in relation ases every one of which is special in this respect, that was some obvious reason why the persons who held money, and to whom demand for its payment was made, ld retain it. They had notice of other claims set up ther people than the assignee under the deed, and, of course, a proper thing in a case of that kind for the trustees, who the money which was demanded, to say—"We owe fealty ther people besides you. Let us see how much is owing to because we are bound to pay the surplus to someone else."

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In cases of that kind it is plain enough that the persons sued are entitled to every light upon the matter. But to apply the principle to a case of this kind, where it is not pretended that any investigation between Fraser's representatives and the plaintiff company would have led to the assurance that the plaintiff company's claim was not well founded as to amount, it would, I think, be straining the principle which has been stated in a very marked way. It is also said that the children of Mary Grace Fraser assert that they are not satisfied that the money due on the mortgage was not paid off by John Fraser. But these are only suspicions, and amount to nothing. Therefore I do not think the claim should be delayed on any such ground. It has also been said that certain then current policies of life assurance were assigned by the deed as well as the interest under McDonell's will referred to; and that if they had been kept in force and paid to the plaintiff company when John Fraser died, the debt might have been wiped out. I am reminded that, although they might have reduced the plaintiff's claim to the extent of 800*l.*, that that would not have been sufficient even at that date to have also paid the mortgage debt with accrued interest. However, the answer to it all is that not one atom of evidence was given that the policy moneys ever were received by the plaintiff company, and it is perfectly clear that the defendants by inquiring at the offices of the insurance companies could have found out whether those moneys had been paid or not. If they had shown that those moneys had been paid, they would have been in a strong position to say—"Account for that money before you are paid." But it would be absurd to say that, because something might be discovered if somebody did something, that would be an answer to this debt in its very wide terms in the deed.

Then we come to a very important aspect of this case, and one which to my mind is by no means so clear as the others. It is admitted for this purpose that in respect of the money claimed there had arisen such a state of things as would undoubtedly have constituted a breach of trust before the Act No. 1769 was passed. It appears that John Fraser was entitled on the death of his wife to the whole of her personal estate,

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including her interest under her grandfather's will. By a mistake of the solicitors to the estate, it was made to appear to the defendant company that John Fraser was only entitled to one-third of that estate, and his children were entitled to the other two-thirds; and, as I have said before, those two-thirds were paid away to these children instead of to the plaintiff company, the assignee of John Fraser. It is submitted that that is a breach of trust, and it is a breach of trust; but it is said that sec. 3 of the Act No. 1769 absolves the defendant company from liability for that breach of trust, and the question is—"Does it do so?" The section runs thus (His Honor read the section and continued). Now from the very reading of that section, it appears to be a very comprehensive one, but for all that it demands very great caution indeed in its interpretation and administration. It has been said, and it is true, that the books—the equity reports particularly—teem with cases of great hardship to trustees—cases where trustees, honest, and acting for the most part with a degree of caution, have been held liable for losses which have befallen the trust funds in their hands, and have sometimes been thereby ruined. But it is also to be remembered that there are a vast number of cases in which *cestuis que trustent*—helpless people, very often—have been ruined by the acts of their trustees. To them it is poor comfort that their trustees acted honestly, and with some degree of caution. In equity, before this Act was passed, there was undoubtedly a certain class of cases in which the trustee could show that although the trust fund was lost he had acted with the ordinary caution of a reasonable man, and that was a sufficient answer. Therefore, there were always cases in which the Court of Equity did not need the assistance of a statute like this. This Court, however, finds itself able to deal with this matter on a very short ground, and, therefore, I propose to deal with it on that ground. But I would like to guard myself against giving a general construction to this section, because there is a vast amount in this section of the gravest importance both to trustees and *cestuis que trustent.* I mention this for the purpose of emphasizing the fact that I am not to be considered as even attempting to exhaust the section.

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The section, I think, clearly excludes fraudulent breaches of trust, and also attempts to differentiate between honest breaches of trust and dishonest ones. I also hesitate to say whether a trustee, who does an act which defeats a legal right absolutely given to a beneficiary by a trust instrument or by the law, even though the question of what that right is is obscure, can come within the section, even though the trustee has acted with perfectly honest intent. There are some things as to which I would like to be cautious and to have to deal with in a concrete case before I give an opinion as to the effect of the Statute. But the position at which the Court arrives is this: In this case, after the money was lost by the trustee, who was avowedly pursuing the advice given by its legal advisers, it did nothing towards reinstating the money lost or towards reinstating any part of it, which perhaps might have been recovered. Two things were possible. The defendant company might have sued the two children of John Fraser to recover the money back from them. It is said it is a doubtful question whether it could have succeeded. Perhaps it is. It is said, also, that the plaintiff might have sued the Fraser children and recovered the money. That is more free from doubt—it seems perfectly clear that they could. Still they may not have had a sixpence, and the plaintiff would have wasted its money in suing them. On the other hand it may be that the error which brought about the difficulty in this case would make the legal advisers liable to the defendant company, the administrator *de bonis non*, if sued in an action for negligence, or if pursued for some indemnity or compensation in whole or in part. We do not know whether such an action would be successful. We have no facts before us sufficient to say whether or not what their legal advisers did amounted to negligence for which they would be liable in damages or for which they could be compelled to reinstate the trust fund. That is a question to be determined upon a consideration of the whole of the facts. The mistake was unquestionably upon a point of law in itself sufficiently simple, although such a mistake might be made under circumstances which, if rightly regarded, would absolve the giver of the advice from legal responsibility. Although the question is now one belonging to the realms of

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legal history, still the change in the law took place only 27 years ago, and there are a great many interests still outstanding which might be affected by it; and it cannot be said to be a fusty question of black-letter law, which a lawyer might be forgiven for forgetting. All that, however, is matter to be dealt with in another place. But we think that a trustee who, however honestly and however reasonably he may have acted, has lost trust funds, is not entitled to heave a sigh for the money lost and stop there. He must come to the Court, and although he has acted honestly and reasonably, must show that he ought fairly to be excused. I think that he must show that he has left nothing undone after the fund was lost in order to get the money back, or, if he has done nothing, it was for reasons which commend themselves to the Court. It may possibly be that any attempt to recover the money would have resulted in the useless expenditure of more money; and if the Court found that he had ascertained that, it might consider that he ought fairly to be excused. But if all he says to the Court is that he has acted honestly and reasonably, the Court ought not for that merely to excuse him. We think that, whatever else sec. 3 means, the Court has a duty to perform in ascertaining whether the trustee in question ought fairly to be excused for the breach of trust, and we think that is what our brother A'Beckett has done. He has found that the trustees were honest, and there is not a shadow of a doubt that they were. It is also put to us that the defendant corporation has only done that which a reasonable man would do. It consulted solicitors about the law, law not being in its particular province. It is said that that ought to absolve them. But it ought always to be remembered that members of the legal profession are in the eyes of the law no different from other persons. They are men usually of considerable knowledge and learning on legal matters, and therefore persons to whom one can resort for advice on legal matters; but whatever advice they give takes the matter very little further. That trustees have taken their solicitors' advice is a matter for consideration in determining whether they have acted reasonably, but the Court cannot thereby be precluded from saying that the trustees ought not to

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F.C.

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Madden, C.J.

be fairly excused. For all these reasons we thi
defendant company has not made out its right t
excused within the terms of the *Trusts Act* 1901
our brother A'Beckett takes that view also, and that
language in one or two places is less lucid than is
case with His Honor, still the obscure passages of
point plainly to what was passing in his mind.
about an indemnity being obtained from the so
advised the defendant company, and it is quite
was in his mind. Consequently we think we
upon the same lines as those upon which
went.

Then it is said that, even assuming that
judgment is right in principle, it is arithmeti
because he has given the plaintiff some 51*l.* mo
entitled to. The learned Judge awarded to the plai
of 673*l.* 18*s.* 10*d.* It is said he ought only to h
622*l.* 12*s.* 11*d.* That is put in this way: It is
defendant company that the former sum represen
which actually came to its hands as administrator
in full, without any of the ordinary deductions to
entitled for expenses or for commission, and it s
to have reasonable expenses and commission allo
whoever got the money ought to pay it. But it
that the plaintiff was entitled to get the mon
defendants as trustees of McDonell's will. T
the defendants is—"We had no notice of the
and therefore we were not to blame for not
it at once to you, and we were not to blam
company obtained administration *de bonis no*
Fraser's estate." Then it is said for the plaintif
"Still, before you, the trustees, parted with the
administrator *de bonis non*, you, the trustees, got
assignment, and therefore you, the trustees, ought
paid the money over to the administrator *de boni*
us. Having paid it to the defendant company as
de bonis non, that company wrongly paid it to th
John Fraser, and the moneys claimed as expenses

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sion are the costs of paying the money to the wrong persons." It is said on the other hand by the defendant company that it nevertheless took the money under its Act of Parliament, which gave it the right to certain commission on all estates that come into its hands, and that it is therefore entitled to keep it. But as against that the fair answer is, we think, that, although in a literal sense the defendant company is entitled to commission, it is not entitled to it in this case, because it got in this title of administrator *de bonis non* only for the purpose of making up a technical title to the moneys that had come to its hands as trustee of McDonell's estate. It therefore seems an unfair thing that the estate should be got in in that way, and the defendant company be allowed to charge the expenses just as if there were two administrations. There was nothing to do except to pay the money over to the assignee. Therefore there could be nothing in respect of which there could be expenses. It appears to us for that reason that it is at all events impossible to say that our brother A'Beckett was wrong in allowing this amount as he has allowed it. The claim of the defendants to retain any part of the sum of 673*l.* 18*s.* 10*d.* would be very theoretical. We think for all these reasons that the judgment appealed from is right, and that the appeal should be dismissed with costs.

HODGES, J. I desire to say a few words in connection with the construction to be put upon sec. 3 of the *Trusts Act* 1901, about which I have had and still feel considerable difficulty, especially in applying its language to the facts of this particular case. The defendants have undoubtedly committed a breach of trust, and they rely on section 3 as discharging them from their responsibility in connection with that breach of trust. In order to bring themselves within the provisions of section 3, it appears to me that they must satisfy the Court that they have acted honestly and reasonably, and ought fairly to be excused. That they have acted honestly is not disputed, and in my opinion the trustees acted reasonably—that is, I think they did everything that a reasonably careful man would do, and they have done nothing that a reasonably careful man would not do. Conse-

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quently, they have satisfied two of three requirements. It is then suggested on their behalf that, these two requirements being satisfied, they ought therefore fairly to be excused, and that, if that were not so, the burden of proof is cast on the shoulders of those who allege that there has been a breach of trust.

With these two arguments I am unable to concur. The Legislature expressly requires the Supreme Court to be satisfied as to three things before discharging a trustee from responsibility—viz., that he has acted honestly, that he has acted reasonably, and that he ought fairly to be excused. The language "ought fairly to be excused" is very broad, and will, no doubt, at times give the Court considerable difficulty in determining on what principle a trustee ought fairly to be excused. In my opinion, as at present advised, I do not think the Court would say a trustee ought fairly to be excused, if, after the commission of the breach of trust, and after he has had knowledge of the breach of trust, he allows time to pass on, circumstances to change, and the estate to lose in respect of that breach of trust through want of action on his part. To put an illustration somewhat like the present case, though not this case: Suppose a trustee had paid the wrong persons through some mistake of fact, and that after the breach of trust was discovered the persons wrongly paid were in a position to refund to the trustee the money that had been wrongly paid to them, but that the trustee did nothing. Then suppose that time passed, that the beneficial owners then came of age, and that by that time the persons who had been wrongly paid had become penniless. If I had to decide in a case of that sort whether the trustees ought fairly to be excused I should say "Certainly not." In that case, having to determine which of two innocent parties should suffer, I would say that the trustee, though innocent up to a certain point, had subsequently failed to discharge his duty as a trustee in respect of such matter, and that the *cestui que trust* had lost thereby, and that he was not equally innocent with the beneficiary. Again, if the money was paid in consequence of the advice of professional persons given under circumstances of gross carelessness and gross ignorance, and if it had been possible after the discovery of the mistake for

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tee to recover the money for the benefit of the estate, did nothing, I should again say that it did not appear Court that the trustee ought to be fairly excused. culty that I have felt in applying that to the facts of is as to whether or not it can be said here that the have any remedy by means of which they could recoup te. That difficulty has not been altogether removed, learned Chief Justice and my brother Hood feel satisfied, not feel that I would be justified in asking that further me should be expended in an argument simply for the of removing my doubt.

DEN, C.J. There is a phrase as to which I had intended in my judgment — a phrase used by our brother t in his judgment. He says:—"I questioned whether ession 'acted reasonably' was properly applicable where n of the trustees was most unreasonable with regard to eficiary affected, but appeared to be reasonable to them they relied on erroneous legal advice." We do not wish derstood to acquiesce in that view, and we do not think her would on further consideration have expressed it. think that what he meant was that the mere light view cautious trustee ought not to dispose of the matter t pleases him, but that on the other hand the trustee be bound by the extravagant views and ideas of the *ue trust* as to what ought to have been done. Very latter is a person who knows very little about the matter. question is what would be the conduct of a person ne would take to be an ordinary, honest, reasonable, careful man. We think that is the view which t, J., intended to express.

D. J. I concur in the judgment of the Court.

Appeal dismissed, with costs.

itors for the defendant company, appellant: *Smith & on.*

itors for the plaintiff, respondent: *Pavey, Wilson &*

H. I. C.

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F.C.

1904
March 10.

In re ROBERT GREW; CANNAWAY *v.* CA

Practice—Originating summons—Questions of fact—Jurisdicti Supreme Court 1884"—*Order LV.*

The Court has jurisdiction to determine questions of fact u summons.

Judgment of Hood, J. (29 V.L.R. 324) reversed.

APPEAL from judgment of Hood, J. (*ante*, p. 3

This was an appeal from the decision of Hoo he had declined to determine a question of fact up ing summons. The summons was taken out on surviving children of the defendant Julia Cannaw a declaration "that the defendant Julia Cannawa bearing, and that the plaintiffs are all the person persons who are or will be entitled under the will as tenants in common in tail general expect death of the defendant Julia Cannaway" in described in the will of the testator. The ap supported by the affidavit of the defendant Ju detailing certain facts. There was also a further by a medical practitioner, stating that, assuming s correct, the said Julia Cannaway was, in his opin bearing.

No opposition was offered on behalf of the the determination of the question, but His H decided that he had no jurisdiction to deal with s of fact upon an originating summons. From this plaintiffs now appealed.

Hayes for the appellants—The Judge was wro that he had no jurisdiction to deal with this qu upon an originating summons. It is a question administration of the estate; all parties are desir the matter determined, and no disputed facts arise is no conflict of evidence between the parties. Th decided upon originating summons in the case of *I*

(*a*) [1901] 1 Ch. 570.

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The Court can ask for further evidence if there is any doubt thrown upon the sufficiency of the evidence adduced, but there is clearly jurisdiction to determine the question.

Brentnall, for the respondents, adopted the argument of the appellants.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., A'BECKETT and HODGES, JJ.] We think in this case the learned primary Judge presents two propositions which influenced his decision. He apparently had very grave doubt as to his jurisdiction to entertain this suit upon an originating summons which involves the determination of a question of fact —that is, whether an originating summons should be applied only to those cases where the facts are admitted. His Honor also seems to have come to this conclusion, that on a question of this kind which may have the effect of excluding persons still unborn or affecting their interests, he was not disposed to decide a question like this on an originating summons. It comes to this, that either he had no jurisdiction, or, assuming jurisdiction, the case is one in which he was not prepared to be satisfied with the class of evidence ordinarily forthcoming on such a summons. We are of opinion that undoubtedly there is jurisdiction to investigate questions of fact, and such a question of fact as this, and if there is jurisdiction to deal with such a question on an originating summons, then the Judge cannot decline jurisdiction, no matter how difficult or troublesome the case may be. Of course, he is at liberty to hesitate before he is satisfied, and may demand independent assistance such as a medical expert sitting as an assessor, or he may insist upon other evidence. Generally, the Judge is at liberty, upon being fully satisfied of the fact he is called upon to decide, to deal with the same. Naturally he will be anxious lest he should exclude the rights of someone who is not represented before him. The authority of *In re White* is a distinct decision that on an originating summons this very question may be determined. There cannot be any doubt that there are many cases which involve questions of fact to which the attention of the Legislature was directed in authorizing

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these originating summonses. The procedure is intended to minimize the costs and delay caused by actions where the facts are not involved or complicated, and where the question may be decided like a question of law. Certainly, questions of fact are not excluded, and there are many questions of fact which may be safely decided under this procedure. In the hurry of business in Chambers there is not the same attention given as to cases duly tried and heard in Court, but there is jurisdiction to insist upon hearing them. It is only necessary to put off other business and to give close attention just as would be given in Court. The learned Judge seems to have hesitated on account of a possible danger arising through his determining a question of this kind hastily upon affidavits, and it appeared to him that the matter would be more properly decided in another form of investigation. We think there was jurisdiction, and the Judge had no right to decline jurisdiction, either because it was hazardous or difficult. He would be at liberty to ask for further elucidation of the evidence or additional evidence, or the assistance of an expert, if he felt himself unable to appreciate that evidence.

We think the appeal must be allowed, and we make the order that was asked for in the Court below, and direct the costs of all parties to be paid out of the estate.

Appeal allowed.

Solicitor for the plaintiffs: *Farmer, Turner & Thompson.*
Solicitor for defendants: *Sir M. H. Davies.*

W. H. M.

[See *Nutter* v. *Holland* ([1894] 3 Ch., pp. 409, 410) and *In re Powers* (30 Ch. D., p. 296).—ED.]

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MIDDLETON *v.* MARKS.

HODGES, J.

1904
February 17,
March 15.

Local Government Act 1890 (*No.* 1112), *s.* 51—*Id.* 1891 (*No.* 1243), *s.* 16—*Councillor "concerned or participating" in contracts with the municipality—Disqualification.*

The object of sec. 51 of the *Local Government Act* 1890 (as amended by Ac No. 1243) is to prohibit a councillor from placing himself in a position where his duty may be in conflict with his interest.

The defendant, a councillor of the X. corporation, was also the paid secretary of an agricultural society which had a permissive occupancy, for the purposes of holding shows, of certain land vested in the corporation.

The council at various times expended money on the Show Grounds, and made contracts for work to be done thereon.

Held, that the defendant was not by reason merely thereof "concerned or participating in a contract with the municipality or in work done under the authority of the council," so as to incapacitate him from holding office as a councillor.

ACTION.

The plaintiff, a resident of Bendigo, sued the defendant, an ex-councillor for the city of Bendigo, for penalties amounting to 5150*l.* The statement of claim was as follows:—

1. The defendant was during the years 1899, 1900, 1901, 1902, at all times material to this action, a councillor of the city of Bendigo, and during the said years he was also the paid secretary of the County of Bendigo Agricultural and Horticultural Society, and received payment therefor to the extent of 142*l.* per annum or thereabouts.

2. During the said years the said society was in the possession of and used for profit that portion of Rosalind Park, in the city of Bendigo, known as the Agricultural Show Grounds, and all buildings, structures, and improvements thereon.

3. At divers dates, after the passing of the *Local Government Acts* 1890 and 1891, and Act No. 1453, the said council, including the defendant, who was present on all the occasions set out in the particulars hereto, authorized certain moneys to be expended and certain works to be done, and such moneys were in fact expended and such works were done upon the said Show Grounds to the benefit and profit of the said society.

4. The defendant, as the paid secretary of the said society as aforesaid, was concerned in and participated in the said moneys expended and works done.

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5. The defendant, by reason of the premises, tated under the provisions of the said Acts to act of the city of Bendigo, but acted as such cou occasions and dates set out in the particulars here

6. By reason of the premises the defendant be forfeit, and forfeited for every time he so acted cillor, a sum not exceeding 50*l.*, and the plai defendant for the recovery of the same in this ac provisions of the said Acts.

Particulars were delivered of the moneys exp the occasions on which defendant acted as a counc

The action was tried at Bendigo by Hodges, jury.

The defence and the material facts sufficientl the judgment.

Mackey for the plaintiff.

Davis for the defendant.

Counsel referred to the following authoriti *Sykes* (*a*); *Holland* v. *Ireland* (*b*); *Barnacle Whiteley* v. *Barley* (*d*); *Nutton* v. *Wilson* (*e*); *Re O'Dwyer* v. *Casey* (*g*).

Cur

March 15.

HODGES, J., read the following judgment:— the Crown granted to the Municipal Corporation and its successors, certain land to be used as a p recreation and amusement. This land, as a whol Rosalind Park, and one portion of it is known a tural Show Grounds. On the 18th Decemb Municipal Corporation permitted the Agricultural tural Society to occupy, for the purpose of it portion now known as the Agricultural Show G terms of a certain document, signed E. Wedd

(*a*) [1892] 18 V.L.R. 13.
(*b*) [1896] 22 V.L.R. 571.
(*c*) [1900] 1 Q.B. 279.
(*d*) [1887] 20 Q.B.D. 196.
(*e*) [1889] 22 Q.B.
(*f*) [1890] 16 V.L.
(*g*) [1863] 2 W. &

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secretary of the Agricultural and Horticultural Society, who, as such secretary, had deposited 10*l.* as security that the society would perform the conditions. The conditions are as follows:—"1. That this permit be renewable annually during the pleasure of the City Council. 2. That a temporary fence be erected by the society round the old cemetery previous to and during the holding of shows. 3. That the scholars of the School of Mines shall have access to the ground for survey purposes except on show days. 4. That the City Council shall have use of ground for any purpose that may be required when not in use for any of the society's shows. 5. That the society shall not be permitted to give the use of the ground to any person or body whatsoever without the consent of the City Council in writing." Although the conditions have a clause relating to a yearly renewal, there never has been any renewal in express terms, but the society has every year, for the purpose of its shows, occupied the Show Grounds for about three days, on which days the society makes a charge for permission to enter, and applies the proceeds at its discretion; with some of the proceeds it has erected buildings on such Show Grounds. Apart from the three days in the year when the Agricultural and Horticultural Society has its show, the land appears to be under the control of the municipality, and the municipality allows St. Patrick's Society to hold yearly sports there, cycling clubs to have two or three meetings per annum, cyclists to use the ground for practice purposes, two or three junior cricket clubs to use the ground all through the season, football clubs to use it during the football season; the Easter Charity Fair, which lasts three or four days yearly, to be held on the grounds; circus proprietors to have their shows on this ground; the military also to use the ground. It is the municipality, and the muicipality alone, that authorizes all these varied occupations, without any reference to the Agricultural and Horticultural Society, though the defendant Marks (the secretary of the Agricultural and Horticultural Society, and also a councillor) is occasionally consulted as to the use of some of the buildings that the society has erected on the ground.

During the years 1899, 1900, 1901, 1902, the defendant was a councillor of the municipality, and during the same time he

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was paid secretary to the Agricultural and Horticultural Society, and during those years the municipality made contracts for work to be done in Rosalind Park—some contracts relating to the Show Grounds only, some relating both to the Show Grounds and to other portions of the park, and the defendant as a councillor took part in the deliberations of the council as to authorizing work to be done on this Show Ground, and as to entering into contracts for work to be done thereon; and it is contended by the plaintiff that the defendant was concerned in or participating in "some manner either directly or indirectly in contracts with the municipality or in work to be done under the authority of the Municipal Council of Bendigo," and that he is therefore disqualified by sec. 51 of the *Local Government Act* as amended by Act No. 1243, and is liable to the penalties as enacted in sec. 53.

Sec. 51, so far as material, enacts that—"No person holding any office or place of profit under or in the gift of the council of any municipality or concerned or participating in any manner whether directly or indirectly in any contract with any municipality or in any work to be done under the authority of such council or in the profit of such contract or work shall be capable of being or continuing a councillor of the municipality. Provided that no person shall be disqualified from being or continuing a councillor of any municipality by reason of being beneficially interested in any newspaper in which the council inserts advertisements or by reason of any such person being a shareholder or member of any incorporated company consisting of more than twenty persons which has entered into any contract with or done any work under the authority of the council."

Speaking generally, it seems to me that the object of that section is to prohibit a person from placing himself in a position where his duty may be in conflict with his interest, and to make persons who do so, in the way referred to in the section, liable to a penalty. If A., a councillor, contracts with the municipality of which he is a councillor to make some road, he is concerned directly in a contract with the municipality. If B. contracted to make such road, and councillor A. contracted to supply B. with the metal of the sizes, etc., stipulated in the contract, A.

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would, I think, be indirectly concerned in a contract with the municipality, or with work to be done under the authority of such council. Again, if B. contracted to make such road, and Councillor A. agreed to finance B., on terms of getting a share in the profit, A. would be concerned in the profit of such contract.

These cases are put, not as exhaustive, but as illustrations of the class of conduct which the Legislature meant to prohibit. But I can find nothing of this kind in the particulars in the case before me. Take the first item. The municipality paid one Saunders 1*l.* wages for "caretaking" the "Show Ground." I cannot see that the defendant Marks, the paid secretary of the Agricultural and Horticultural Society, was concerned or participating directly or indirectly in the contract Saunders made with the municipality for "caretaking" the ground. Nor can I see that the defendant was concerned or participating directly or indirectly with the work to be done by Saunders, nor that he was concerned or participating directly or indirectly in the profit of such contract or work. And it seems to me that it would lead to absurd results, not warranted by the section, to say that the Agricultural and Horticultural Society was interested in the ground being kept in order; that, if the ground were not kept in order, the funds of the Agricultural Society might be diminished; and, if the funds of the society were diminished, the society might not be able to pay the defendant his salary. Such possibilities are altogether too remote. And, as was put in argument on such a view, no council could be obtained which could discharge its functions. On such a construction of the words "concerned or participating," no council could authorize a contract for making any road, as some of them would in all probability have property near which the road was to be made, and so would be concerned or participating in the contract, and illustrations could be given showing that councillors, by reason of this provision in sec. 51, could not authorize any road-making or bridge-making works—the doing of which are among the principal reasons for their existence.

I am therefore of opinion that the plaintiff has failed to

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establish that the defendant is liable to any penalty, and there will be judgment for the defendant, with costs.

Solicitor for plaintiff: *Ni Gan.*
Solicitors for defendant: *Cohen, Kirby & Woodward.*

J. M.

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1904
March 7.

BROCKWELL *v.* THE LONG TUNNEL EXTENDED GOLD MINING COMPANY.

Mines Act 1897 (*No.* 1514), *s.* 129—*Accident in a mine—Negligence—Onus of proof—Questions for jury.*

In an action for damages for injuries caused by an accident in a mine the jury found—(*a*) that there was an accident in the defendant's mine on the date in question; (*b*) that that accident caused the plaintiff's injuries; (*c*) that the defendant had not satisfied them that the accident was not caused by any negligence on its part.

Held, that, having regard to sec. 129 of the *Mines Act* 1897, the plaintiff was, on these findings, entitled to judgment, and that an express finding of negligence was unnecessary.

APPEAL FROM COUNTY COURT.

The plaintiff, Charles Brockwell, sued the defendant company in the County Court at Melbourne, claiming 1500*l.* as damages for injuries sustained by him by reason of an accident in the defendants' mine. The action was tried by a judge and jury. From the evidence it appeared that across the shaft at the various levels were movable floors or gates of iron bars. When the cage was stationary at any level it rested upon one of these gates. When it was desired to pass through an intermediate to a lower level the practice in the mine was to stop the cage about ten feet above the gate, and there wait until a signal was given that the gate had been removed. According to the evidence for the plaintiff, he was, on 19th May 1902, descending in the cage to the 2000-feet level, and, on reaching the 700-feet level, the cage, instead of being stopped, according to the usual practice, above the gate, was lowered upon the gate with such force that the plaintiff was thrown down and injured. The defence was that

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speed of the cage was slackened, and that there was no jolt 11.

The further evidence appears sufficiently from the judgment. Sec. 129 of the *Mines Act* 1897, which was relied on by the ntiff, is as follows:—"Any accident occurring in a mine l be *primâ facie* evidence that such accident occurred ugh some negligence on the part of the owner."

The questions submitted to the jury, with their findings eon, were as follow:—

1. Was there an accident in the defendants' mine as alleged 29th May 1902? Answer: Yes.

2. Was that accident the cause of the plaintiff's injuries? wer: Yes.

3. Have the defendants satisfied you that the accident was caused by any negligence of theirs? Answer: No.

4. What damages do you award the plaintiff? Answer: 1.

On these findings the learned Judge entered judgment for the ntiff. The defendant company having moved for a new trial, motion was dismissed, and a new trial refused. This was an eal from the order refusing a new trial.

McArthur (*Bryant* with him) for the appellant—Sec. 129 of *Mines Act* 1897 does not do away with the ordinary rule t there must be an affirmative finding of negligence on the endant's part to entitle the plaintiff to succeed. That section y affects the onus of proof which must be considered at ious part of the case. The position brought about by the ion is precisely the same as if plaintiff had given evidence of ligence. The defendant has then thrown upon him the onus calling evidence to rebut that evidence. But the issue for jury is still as before the Act. "Has the defendant been lty of negligence?" The case is exactly parallel to the class of es where "*res ipsa loquitur*" applies. The accident is not of—it is only *prima facie* evidence of some negligence. It is dence from which the jury may infer negligence, not from ich they are bound to infer it. The jury must record a dict that the accident was caused by the negligence of the

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BROCKWELL v. THE LONG TUNNEL EXTENDED GOLD MINING COMPANY.

defendant; they should be asked—"Are you s
defendant was careless?" not "Are you satisfie
was careful?"

[HOOD, J. How do you distinguish *Smith* v. *R*
Byrne v. *Boadle* (*b*) is even stronger.

HODGES, J. Take a case where the plaintiff's
simply—"I came down with a jolt," and the defend
did not come down with a jolt." Where the case
as that, do you contend that these questions w
sufficient?]

Cases of carriage of passengers stand on a diffe
There the defendant may, in certain cases, have
negligence.

He referred to *Gee* v. *Metropolitan Railway Co.*
v. *Nye* (*d*); *Chapman* v. *Victorian Deep Leads Co.* (
v. *London and S.W. Rly. Co.* (*f*); *Ex parte Healy*
Melbourne Tramway, etc., Co. (*h*).

On the question of damages, the direction was
The learned Judge merely read to the jury a pas
report. He should have explained and applied the
the facts of this case. The Judge omitted to call th
distinctly to all the contingencies of the case:
Hoskins (*i*).

Eagleson for the respondent was heard only on t
as to damages—The Judge simply adopted the
expressing in the best way his own views. It is th
he had recited from memory a proposition which e
law on the subject.

Bryant in reply—The direction as to da
insufficient in that it—(*a*) made no reference to th
life" of the plaintiff; (*b*) did not refer to plaintiff's ab
lighter work; (*c*) the jury were not told that,

(*a*) [1882] 8 V.L.R. (L.) 256.
(*b*) [1864] 2 H. & C. 722.
(*c*) [1873] L.R. 8 Q.B. 161.
(*d*) [1881] 6 Q.B.D. 685.
(*e*) [1902] 28 V.L.R. 677.
(*f*) [1886] 12 App. C
(*g*) 3 N.S.W. State
(*h*) [1880] 6 V.L.R.
(*i*) [1892] 18 V.L.R

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ence that the plaintiff had Bright's disease, they should have rd to the fact that, if he had it, that would shorten his king life.

'BECKETT, J., delivered the judgment of the Court ECKETT, HODGES, and HOOD, JJ.] This is a motion for w trial of an action tried in the County Court before ry, the plaintiff seeking damages for injuries the result n accident in a mine. The learned Judge sent certain tions to the jury, and the contention has been that, on the ers to those questions, judgment should not have been red for the plaintiff; that the questions do not dispose of e matters upon which the jury's opinion was essential, and there should be a new trial; and a very long and ingenious ment was addressed to us upon the form in which the tions should be put under varying circumstances. In some mstances it might be difficult to say exactly the form which questions on a matter of this sort should take; but our duty viously to consider whether the questions put are sufficient e case before us to elicit the jury's opinion upon the facts, h were necessary for it to determine in order to say her there ought to be judgment for the plaintiff or for the ndant. The shape that the questions should take must, of se, in each case depend upon the nature of the facts in ite, and the case made by the defendant as against the facts ed or relied upon by the plaintiff.

'he questions for our consideration were these:—That this tiff was employed on the mine, and desired to be sent n in the cage to a particular level, and that in being red to this level, and before he got to that level, he untered a staging—some obstruction which was mov- but which, if the cage were lowered without the d of lowering being reduced as it approached this point, ld cause a severe jar, with consequences more or less sirable to persons in this cage. The evidence for the tiff was that he was being lowered at this high degree peed, and that a substantial jar occurred when he came to point, much more than and something altogether different

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from that which would attend the ordinary concussion when the cage was lowered, except when lowered by something which amounted to accident; that he was sent down too fast; that the cage struck this obstruction, and that caused the jolt which injured him. The defendant's evidence consisted in a denial of those facts. It said the man was lowered at a rate of speed which would not allow of such a jar. That no such indications of sudden jar as the revolving of the windlass were observed, which would have been present if there had been such a jolt or sudden stoppage as plaintiff described. That is a matter on which his evidence was contradicted. There was scarcely any attempt to prove any independent series of facts which, supposing there had been such a jar, would have exempted the defendant from liability. That being the character of the dispute upon which the jury was asked to decide, these questions were asked (His Honor read the questions left to the jury).

The contention on behalf of the defendant has been that this is calling upon the defendant to disprove something which it is not necessary for it to disprove, but which has to be proved against it; that there has been really no finding of the jury on the question of negligence, and that the question of whether the defendant was negligent or not has not been determined. We think that is involved in the answer to the first question. What they were asked was—Was there an accident? and the jury on the broad facts have given a finding that this cage came down with a run. They found that there was this accident, which was negligence, unless there should be any explanation which defendant was able to find for it. The jury were invited to answer everything which called for answer. Having regard to question 1, and the nature of the defence, we think that question 3 was sufficient. Taking 1 and 3 together, there was a sufficient finding upon the question of negligence, and the Judge need not have sent the jury any further question. We think that it was substantially a verdict on the question of negligence—in short, that the answers were sufficient, and that the motion on that ground should fail. As to the other question of damages: From the first I had a strong

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on that there was no undesirable omission from the Judge's e upon that question. My learned brothers thought more s objection than I did, but I understand they do not now there is enough in it to justify any disturbance of the ct on that ground. The appeal therefore will be dismissed, costs.

Appeal dismissed.

olicitors for appellant: *Haden Smith & Fitchett.*
olicitors for respondent: *Barrow & Pearcey.*

J. M.

GRAVES v. LOVICK.

A'BECKETT, J.

1904
March 9, 25.

Act 1901 (*No.* 1749), *ss.* 186, 187, 196—*Driving sheep or cattle across land any other person—Notice required—Interest in land—Whether grazing ensee entitled to notice – Person possessed of* 500 *sheep—Whether sheep must be land driven over—Justices Act* 1890 (*No.* 1105)—*Rules under—Witnesses' penses.*

e words "land of any other person" in sec. 196 of the *Land Act* 1901 749) mean land in which another person has an interest, and are not to be d to land belonging to or the property of some other person.

ld, accordingly, that before cattle are driven over Crown lands held by r person merely under a grazing licence, the notice required by sec. 196 e given.

such person is possessed of 500 sheep he is entitled to the statutory notice, gh he has no sheep on the land in question at the time of the alleged e.

stices have no power to allow as witnesses' expenses any amounts other or r than those set out in the scale provided by the rules under the *Justices* 90.

ORDER TO REVIEW.

he defendant, William Francis Lovick, was informed nst for that "on the 17th day of January 1904 he drove in cattle across the land of the informant and did not less than 12 hours nor more than 24 hours before ring upon such land either give or deliver at the residence e occupier of the said land or give or deliver to the manager ing upon such lands or post in a conspicuous place upon the land a notice of his intention so to drive such cattle and by

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such notice state from whence he had brought
whither he was driving them contrary to the Sta
informant being possessed of not less than 500 shee

The information was heard by the Court of I
at Mansfield, when it appeared from the evidence t
was the holder of grazing licences issued under s
Land Act 1890 over the lands in question. It
that at the time of the alleged offence the infor
sheep on the land in question, or within 20 miles o
of the evidence, so far as material, is sufficiently s
judgment of A'Beckett, J. (*infra*).

The justices fined the defendant five shillin
guineas costs.

An order *nisi* was obtained to review this de
grounds—

(1.) That there was no evidence that the def
cattle or sheep across the land of any other perso
meaning of the *Land Act* 1901.

(2.) That there was no evidence that the in
possessed of 500 sheep within the meaning of the s

(3.) That the justices sitting as aforesaid had
allow the sum of 9*l.* 9*s.* on account of the atter
witness McKinnon and his expenses.

On the return of the order *nisi*,

Starke appeared to move the order absolute.

Kilpatrick to show cause—The first question is,
under a grazing licence under sec. 123 of the *La*
(sec. 187 of the *Land Act* 1901) land of any other
the meaning of sec. 196 of the *Land Act* 1901?"
is, "Do the words, 'who is possessed of 500
'possessed of 500 sheep on the land which is driven
examination of the Act shows that for many pur
of licences may occupy. (He referred to secs. 165,
191, and 195 of the *Land Act* 1901, and condit
licence.) This case is not covered by *Vaughan*
Benalla (*a*); *Quinane* v. *Brown* (*b*); or *Shire of*

(*a*) [1891] 17 V.L.R. 129. (*b*) [1901] 27 V.L.R

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ombe (*c*). The section does not say the 500 sheep must
he land driven over. The Court will not read words
Act of Parliament unless it is necessary in order to
ense of it.
the question of allowance of costs he referred to *Justices*
0, sec. 89 (1) and (6).

ke in reply—(*a.*) Sec. 196 applies to travelling stock.
idence showed that the informant seized the defendant's
the defendant had under protest paid trespass rates to
them, and was simply driving them back to his own
They were not driven across the informant's land within
ning of the section. (*b.*) The evidence is that informant
sheep on the land. The whole object of the section is
to protect sheep actually on the land across which other
re going to be driven. (*c.*) Sec. 196 clearly refers to
land. "Land of any other person" means land of some
which land has been alienated from the Crown. *Shire*
mera v. *Brimacombe* is conclusive on the point. Secs.
191 are the only sections which refer to grazing licences.
e *Justices Act* 1890 lays down (*vide* p. 1741 of the
s) the rules with regard to allowances to witnesses.
as no power to make the allowance here made.

Cur. adv. vult.

CKETT, J., read the following judgment:—This was an
o review a decision of Justices imposing a fine of five
s for non-compliance with sec. 196 of the *Land Act* 1901,
g notice to be given before cattle are driven across land.
ceding sec. 195 gives a person travelling cattle the right
e on unsold Crown lands within a quarter of a mile on
ide of any road or track commonly used as a thorough-
Sections similar to 195 and 196 of the Act 1901, were
d 129 of the *Land Act* 1884, and 131 and 132 of the
ct 1890. In each of the series the first section provides
travelling stock are to be driven towards their destina-

(*c*) [1897] 23 V.L.R. 217.

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A'BECKETT, J.
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tion at the rate mentioned in the second section, and the second section provides not less than eight miles a day for cattle and not less than five miles a day for sheep. The two sections are to be read together. The informant here was licensed under grazing licences first issued under the *Land Act* 1890, covering 38,000 acres of Crown lands. The licence gives the right to enter with cattle, sheep, and other animals upon specified Crown lands, and therewith to depasture. It confers no right to fence without permission of the Minister. The section of the Act as to notice runs thus—"Every person intending to drive cattle or sheep across the land of any other person who is possessed of not less than 500 sheep" shall give notice as specified. The informant swore that he was possessed of over 500 sheep, but that, at the time of driving, he had neither sheep nor cattle on the land over which defendant had driven, or within twenty miles of it. He usually had them on during summer, and intended bringing them on shortly.

The first ground of the order to review is—"That there was no evidence that the defendant drove cattle or sheep across the land of any other person within the meaning of the *Land Act* 1901." The second ground is—"That there was no evidence that the informant was possessed of 500 sheep within the meaning of the Act."

As to the first ground, it appeared that the cattle which were driven had been seized by the informant and another person, and that the defendant had paid trespass rates under protest to release them, and that the cattle were being driven back to their owner's land by the only tracks by which they could be driven. It was contended that this was not such a driving across as the section contemplated. I think that the reason for driving was immaterial, and did not dispense with the necessity for notice, even if the cattle had been wrongfully seized and driven to the place from which they had to be brought back. It was also contended that land held under grazing licence was not land "of any other person" within the meaning of sec. 196, because it was Crown land, and the reference in the section to the occupier of such land and his residence showed that it was inapplicable to a licensee, who had no right to occupy or reside. I think that

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ds "land of any other person" merely mean land in nother person has an interest, and are not to be confined belonging to or the property of any other person. The presupposes a limited interest in the land; it deals with at other persons can lawfully drive across without the of the person to receive notice. It does not confer a ıt imposes a condition upon the exercise of the right d by the preceding section. As to the section con- ing an occupier or manager residing on the land, it vides for posting notices on a conspicuous part of the ıere there is none. As to the reason for applying the nt to land held under a grazing licence, a person having to graze over an area would need protection against entry and loitering and feeding over it as much as a with a larger interest in land which travelling cattle ross over. I think the words of the section are wide to include lands being depastured under a grazing and there is good reason for including them. I am e against the first ground of the order *nisi*. My decision ay conflicts with *Wimmera Shire* v. *Brimacombe* (*c*) or *e* v. *Brown* (*d*).

to the second ground, the possession of 500 sheep seems been adopted as an arbitrary test of the need for on. I suppose it was considered that unless a man had 500 sheep to feed he would not be injured by travelling r cattle; but whatever may have been the reason for l provision, words cannot be read into it to require that heep shall be on the area at the time of the complaint. re moved from one feeding ground to another, according on and condition. The grass intended to feed them not be eaten by travelling stock before they are put on. e against the second ground of objection.

third ground of the order is that the justices had no to give 8*l.* 8*s.* costs for the four days' attendance of Mr. non, a surveyor called as a witness, in addition to 1*l.* 1*s.* expenses. According to the scale for witnesses, the could not have allowed him more than 1*l.* a day except

(*c*) 23 V.L.R. 27. (*d*) 27 V.L.R. 100.

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under special circumstances stated in the third column of the scale, which do not appear to have existed in this case.

I therefore think that the order for costs must be reduced by 4*l.* 8*s.* Instead of the defendant having to pay 10*l.* 10*s.* costs, he will have to pay 6*l.* 2*s.* Subject to this amendment of the order, the order will be discharged. I discharge it without costs, having regard to the applicant's partial success, and to the apparently vexatious character of the prosecution. The informant seems to have had all that he could reasonably have expected in the way of notice, and to have been as well able to protect himself as if he had had notice in the form required by the Act. The nominal fine imposed by the justices leads me to think that they were of the same opinion.

Order amended accordingly.

Solicitor for informant: *J. E. Dixon* (for *Lecky*).
Solicitor for defendant: *Walker* (for *Davidson*).

J. M.

HOOD, J.
1904
February 25.

GYTON *v.* OUTTRIM.

Claims against the Commonwealth Act (No. 21 of 1902)—Operation and effect of—Action of tort against the Commonwealth—Negligence of servants of Commonwealth—Respondeat superior—Cause of action.

The *Claims against the Commonwealth Act* (No. 21 of 1902) is not merely a procedure Act, nor is it retrospective in its operation.

Where A. had, prior to the coming into force of the above Act, sustained injuries through the negligence of the servants of the Commonwealth,

Held, that no action lay against the Commonwealth in respect of such injuries, even after the Act came into force.

ACTION.

The *Claims against the Commonwealth Act* 1902 (No. 21 of 1902) came into force on the 10th day of October 1902.

The Act provided, sec. 2—"Any person making any claim in contract or tort against the Commonwealth may . . . . petition . . . . the Governor in Council praying him to appoint a nominal defendant on behalf of the Commonwealth in the matter of the claim and the Governor in Council may appoint any person to be nominal defendant accordingly."

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3 (i.)—"The petitioner may in respect of the claim bring
on . . . . in the Supreme Court of the State in
the claim arose. (ii.) The rights of parties in the action
. shall as nearly as possible be the same and judgment
e given and awarded with costs on either side as in
y cases between subject and subject."

plaintiff, Thomas Henry Gyton, on 28th February 1903,
ed the Governor in Council under the Act, and Frank
uttrim was appointed nominal defendant.

writ in this action, which was issued on 5th May 1903,
dorsed as follows:—"The plaintiff's claim is against the
nt, as the defendant duly appointed, etc., for damages
uries sustained through the negligence of the Common-
or its servants by the plaintiff, whilst engaged in
g telegraph poles, the property of the Common-
" From the evidence for the plaintiff it appeared that
s employed by the Department of the Postmaster-
l of the Commonwealth to paint the telegraph poles along
in road. He was told that certain of the poles which
arked had been condemned, and were not to be painted.
er to carry out the work, plaintiff, on 29th July 1901,
d a ladder placed against one of the posts not so marked,
ilst engaged in painting it, the pole broke off a few inches
he ground, and the plaintiff, being in imminent risk of
umped to the ground to save himself, and broke his leg.

ffy, K.C. (with him *Williams*) for the defendant—Apart
he *Claims against the Commonwealth Act* 1902, it is
at no action would lie against the Commonwealth for a
That Act came into force after the accident, the subject of
ction, happened. The Act is clearly not retrospective.
was no cause of action at the date of the accident.

unson for the plaintiff—The Act is retrospective, and
to events happening before it became law. If it be held
ise, then the same thing applies to contracts, and between
auguration of the Commonwealth, or the taking over of
epartment and the passing of the Act, no action, even in

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contract, could have been brought against the Commonwealth. The Court will hesitate to put a construction on the Act which would lead to that result. Moreover, there was a complete cause of action here prior to the Act. The difficulty was always that, as no Court could make an order against the Crown, and no execution could issue against it, the action could not be brought. But the facts constituting a cause of action existed. Then this Act removed that difficulty.

He referred to—21 Vict. 149; *Farnell* v. *Bowman* (*a*).

Duffy, K.C., in reply, referred to *Feather* v. *Queen* (*b*).

HOOD, J. In this case the plaintiff's cause of action, when analyzed, consists first in the fact that he received an injury, and secondly in the fact that he received that injury through the fault or negligence of some person. So far, if he stopped there he would only have an action against the person who actually caused the injury. He seeks, however, to make a third person—using the word person in its generic sense—liable for the injury which that third person did not directly inflict. In order to sustain that action he has to show that the relation between the third person and the other person is such that the third person is liable in law for the negligence that caused the injury. Now, in the case of the Crown he fails at once, apart from statute, for the third person whom he is suing—the Crown—is not liable for the negligence of any of its *employés*. Taking that proposition to be correct, therefore, until this Act of Parliament was passed no action could be brought against the Commonwealth, because the Commonwealth was not responsible for the wrongful act of a person who injured another. The Act now enacts that the Commonwealth shall be liable for the wrongful acts of its servants and *employés*, thereby at the time it was passed completing the cause of action. That shows that the Act is not a mere procedure Act, but it is an Act which completes a previously incomplete cause of complaint. Then it is said—and this is the view most

(*a*) [1887] 12 App. Cas. 643.

(*b*) [1865] 6 B. & S. 213; 35 L.J. Q.B. 200.

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gly relied on—that this Act was retrospective. But Mr. son's argument amounts to this, that the Legislature, if ere seeking to do perfect justice, would have made, and t to have made, the Act retrospective. But in my on it has not done so. There is not a syllable in the Act ent from any other Act, and the right it gives is simply to right as to things done in the future.

olicitor for the plaintiff: *Scott.*
olicitor for the defendant: *Guinness.*

J. M.

[IN CHAMBERS.]

A'BECKETT, J.
1904
March 28, *April* 27.

HALL *v.* JOHNSON.

nstruments Act 1890 (*No.* 1103), *s.* 208—*Part performance—Parol promise to ave property by will in consideration of marriage—"Rules of the Supreme ourt* 1900"—*Order XIV.*(*a*).

verbally promised B. that, in consideration of her marrying him, he leave her half his real and personal estate by his will. B. thereupon d A., who did not leave half of his property to B. by his will. In an by B. against the executrix of A., claiming a declaration that A. was to leave, by his will, one-half of his property to B.,

ld, upon an application by the defendant under Order XIV.(*a*) for judg. that the marriage was not a sufficient part performance to take the case sec. 208 of the *Instruments Act* 1890, and judgment was given for the dant.

THIS was a summons on behalf of the defendant Johnson r Order XIV.(*a*) for summary judgment. The facts are set out in the judgment.

Starke, for the defendant, in support of the summons.

H. Barrett, for the plaintiff, to oppose.

Cur. adv. vult.

A'BECKETT, J., read the following judgment:—The defendant lies by summons, under Order XIV.(*a*), for summary judg- t. She is the executrix of Harry Hall, the late husband of

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the plaintiff. After his death the plaintiff brough
which the statement of claim, so far as ma
follows :—

"The plaintiff and the said Harry Hall were
19th day of April 1887, and by agreement, part
partly in writing, made prior to such 19th day
the plaintiff and the said Harry Hall contracted ar
in consideration of the plaintiff marrying the sa
the said Harry Hall would by his will leave to the
half of his real and personal estate. The said Ha
on the 7th day of May 1903, leaving a large amou
personal estate, but did not by his will . . .
plaintiff one-half of his real and personal estate.

"The plaintiff claims :—(1) A declaration that
Hall was bound to leave by his will one-half of
personal estate to the plaintiff; (2) a decree that
as executrix as aforesaid, do transfer one-half of
the plaintiff."

In answer to inquiries by the defendant as
containing the promise, certain letters were produ
inspection were found to contain no such promis
the defendant took out this summons. From t
made by counsel, for the purpose of the argume
the case, assuming, firstly, that such a promise wa
word of mouth only; secondly, that the plaint
reliance upon such promise. The question I have
therefore—Is marriage sufficient part performanc
case out of the Statute requiring agreements of t
in writing? On looking at the authorities, I fee
the subject. In *Lassence* v. *Tierney* (*a*), Lord Cott
judgment in *Hammersley* v. *De Biel* (*b*) had cause
upon the point, says:—"I there said that a
followed only by marriage is not to be carri
marriage being no part performance of the contrac
there would be an end of the Statute, which says t
in consideration of marriage shall not be binding
writing, but if marriage be part performance

(*a*) [1849] 1 Mac. & G. 551. (*b*) [1845] 12 Cl. &

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ct followed by marriage would be binding." This state- of the law has never been questioned, though there have ases where verbal representations by a third person, on ength of which a marriage was entered into, have been o bind the person making them. These depend on other ples, and I need not further refer to them. For the lant, *Maddison* v. *Alderson* (c) was referred to, the head- f which is as follows :—

An intestate induced a woman to serve him as his house- r without wages for many years, and to give up other ects of establishment in life, by a verbal promise to make a aving her a life estate in land, and afterwards signed a not duly attested, by which he left her the life estate. that there was no contract, and that even if there had and although the woman had wholly performed her part rving till the intestate's death without wages, yet her e was not unequivocally and in its own nature referable contract, and was not such a part performance as to take se out of the operation of the Statute of Frauds, sec. 4, and she could not maintain an action against the heir for a ration that she was entitled to a life estate in the land."

here the reasoning upon which part performance is allowed e a case out of the Statute is elaborately examined. Lord gan says :—

There is no conflict of judicial opinion as to the essential cter of the act which shall amount to part performance in articular. It must be unequivocal. It must have relation one agreement relied upon, and to no other. It must be ent of itself, and without any other information or nce, to satisfy a Court, from the circumstances it has ed and the relations it has formed, that they are only stent with the assumption of the existence of a contract, erms of which equity requires, if possible, to be ascertained enforced."

bviously marriage does not fulfil these conditions. It does mport anything more than the prior contract to marry, gh it is often preceded by a prior contract as to property.

(c) [1883] 8 App. Cas. 467.

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I therefore direct judgment to be entered for the defendant.

Apart from the power given by the new rules, the Court has inherent jurisdiction to dismiss the action as an abuse of the procedure when the claim is incapable of proof, and without any solid basis: *Lawrance* v. *Lord Norreys* (*d*).

This order, in my view, does not fall within sec. 2 of Act No. 1696 requiring leave to appeal. I would give leave if I thought it necessary.

Judgment for defendant.

Solicitors for plaintiff: *Goldsmith & Sharp.*
Solicitors for defendant: *T. P. Derham.*

W. H. M.

MADDEN, C.J.
1904
February 3.

STEPHENS *v.* McKENZIE; McKENZIE, *Claimant.*

Evidence—Uncontradicted evidence disbelieved by magistrates—Duty of magistrates—Claim by wife to household goods.

Where facts, which might have occurred, are sworn to have in fact occurred, and the evidence is uncontradicted, magistrates are bound to find in accordance with such evidence, however much they may suspect it.

Dulon v. *Roberts* ([1890] 11 A.L.T. 168) referred to on the question of a wife's claim to goods ostensibly belonging to her husband.

ORDER TO REVIEW.

Under a warrant issued against the goods of the defendant, Stafford McKenzie, certain furniture was distrained at 30 Green-street, Northcote, where he and his wife, Grace McKenzie, lived. The furniture was claimed by Grace McKenzie, and thereupon a summons was issued under sec. 98 of the *Justices Act* 1890, in order that her claim might be adjudicated upon. At the hearing before the Court of Petty Sessions at Northcote on 14th December 1903, evidence was given by the claimant that since the insolvency of her husband in 1895 she had successfully carried on his former business of a tannery in her own name; that she had always had money of her own; that during 1901 she had won the sum of 34*l.* 10*s.* in Tattersall's

(*d*) [1890] 15 App. Cas. 210.

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sweep; that she had given her brother-in-law, Joseph McKenzie, 10*l.* wherewith to purchase the furniture in question, which he had done at a cost of 8*l.* 5*s.*; and that the house, 30 Green-street, Northcote, was rented by her from Joseph McKenzie. This evidence was corroborated by her husband, her sister, and Joseph McKenzie. No evidence was called for the execution creditor. The magistrates, in giving their decision, said that in their opinion the business was carried on by the claimant merely as a "dummy" for her husband; that her evidence that she had kept her money in a tin box in her bedroom for more than two years was an extraordinary story; and that they had come to the conclusion, though with some doubt, that the furniture was bought with her husband's money; and they therefore decided against her claim.

An order *nisi* to review this decision was obtained on the grounds (shortly)—

(1.) That there was no evidence to support the decision of the magistrates.

(2.) That there was uncontradicted evidence that the furniture was the property of the claimant.

H. I. Cohen for the claimant to move the order absolute.

Wasley for the execution creditor to show cause referred to *Dulon* v. *Roberts* (*a*).

MADDEN, C.J. I think that in this case the order *nisi* should be made absolute. The argument which counsel for the execution creditor has presented is undoubted—that if a wife claims goods which are ostensibly the goods of her husband, as against a creditor of his, and she is uncorroborated in her claim, the Court ought to hesitate very much indeed before it declares that the property, which is apparently his, and in fact would be deemed to be his but for the wife's unsupported oath, belongs to the wife, because of a supposed gift by him to her, no definite gift being established according to law.

I quite agree with the view of Hood, J., as expressed in

(*a*) 11 A.L.T. 168.

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Dulon v. *Roberts* (*b*), that the Court ought to scrutinize these transactions very carefully, and ought not to accept a wife's uncorroborated statement with regard to them. In the present case the wife, as she is entitled to do since the *Married Woman's Property Statute*, carried on business in her own name, and rented a house, and let her husband live with her. The business was declared and known to be hers. On her evidence as to these facts she is corroborated by three witnesses. Then she is a woman who might have had money to put into Tattersall's sweep, and she swears that she did; that she won over 34*l.*; and that this was the money out of which she, one or two years later, purchased the furniture in question here. I am surprised to find how common this sort of thing appears to be. It is quite remarkable how often otherwise impecunious people do get into a position at the proper time by virtue of a win in "Tattersall's;" but for all that she swears that she did go into a sweep, and won; while her brother-in-law, her husband, and her sister also swear that she did so. All know the amount was more than 34*l.* Moreover, she says she believes it was on the Melbourne Cup. Furthermore, one of the witnesses says that the fact was published on the walls of the factory—apparently this was a kind of public proclamation of the fact that she had won the money. However, that was an invitation to call somebody employed in the factory to prove that there was perjury committed in saying that that was done. Everybody would naturally suspect a story of money having been won like that, but still magistrates are not at liberty, when they have definite and coherent evidence before them, without any contradiction of it whatever being brought forward, to find against that evidence, however much they may suspect it. The magistrates are bound to find according to the evidence. They are not bound to believe any story presented to them; but if the story be at all reasonable or probable, and the facts alleged are such as might occur, and they are sworn to have in fact occurred, and the evidence is uncontradicted, then the magistrates must find in accordance with it. There is a great deal of evidence upon which the Court has frequently to act which it

(*b*) 11 A.L.T. 168.

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ects, but it has to act upon it, if it be not unconscionable to o. If in this case there had been a little evidence to the rary, the magistrates might properly have said that they erred to believe it, but there was none. The order will be e absolute, with costs to be taxed. Judgment below set e. No costs of the proceedings below.

Order absolute.

Solicitors for the execution creditor: *Farlow & Barker.*
Solicitor for the claimant: *Lazarus.*

H. I. C.

O'DONNELL *v.* BOLAND.

Betting Suppression Act 1896 (*No.* 1436), *s.* 2—*Betting in street—Evidence—dmissibility—Evidence of betting on previous occasion—Conduct showing urpose—" Undertaking to pay money "—Sufficiency of evidence.*

pon a prosecution for being in a street for the purpose of betting, evidence dmitted of the accused having, a fortnight previously, made a bet in the street, and of a conversation on that occasion as to being able to find him between seven and eight o'clock in the evening.

eld, that the evidence was properly received to show the purpose for which ccused was in the street—namely, the purpose of betting—and as negativing ggestion of his being there for any other purpose.

e principle of *The King* v. *Wyatt* ([1904] 1 K.B. 188) applied.

a prosecution under sec. 2 of the *Street Betting Suppression Act* 1896 the ertaking to pay money " may be established without evidence of the mean- all the terms of the wagering contract, as, *e.g.*, the amount of money the ed undertook to pay in the event of the horse which was backed winning.

ORDER TO REVIEW.

t the Court of Petty Sessions at Prahran, on the 24th h 1904, Samuel Boland was charged with being unlawfully hapel-street, Prahran, on 19th December 1903, for the ose of money being received by him as and for the considera- for an undertaking by him to pay thereafter money on the ngency of a certain horse race.

vidence was admitted by one Rouse as to meeting defendant hapel-street on a previous occasion, 5th December 1903, defendant said—" What horse do you want to back ?"

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Rouse replied—"Battledore for the Welter." Defendant said—"All right." A ticket was written out and given to Rouse, who paid 1*s.*, and defendant said—"You will know where to find me; I will be here between 7 and 8 in the evening." This evidence was objected to.

Evidence was also admitted under objection that, on 19th December 1903, defendant made a wager of 1*s.* on a horse named Gambler. An entry form, containing the entry of Gambler for a race, at a meeting held by the Mooney Valley Race Club on the 19th December 1903.

Other facts appear from the judgment.

Defendant was convicted and fined 20*l.*, with 5*l.* 5*s.* costs.

An order *nisi* to review this decision was obtained on the grounds—

(1.) That evidence was improperly admitted.

(2.) That there was no evidence adduced of—(*a*) any undertaking by defendant to pay money; (*b*) any contingency; (*c*) any certain horse race.

Potts to move the order absolute.

Meagher to show cause—The evidence as to the previous betting transaction is clearly admissible to show purpose.

[HODGES, J., referred to *Rex* v. *Wyatt* (*a*).]

Before you can set aside a conviction on the ground of improper reception of evidence, the evidence objected to must be of a kind such as is likely to have influenced the minds of the magistrates. It must be evidence such as would necessarily lead the magistrates to a conclusion unfavourable to the prisoner. "Irrelevant evidence of an immaterial fact being admitted in a criminal trial does not invalidate the conviction, and is no ground for a new trial:" *Regina* v. *Ainsworth* (*b*), and *cf.* *Regina* v. *Kenny* (*c*). In all the cases in which a conviction has been set aside, the evidence which has been wrongly admitted has been of a most important character: *Cf.* *Reg.* v. *Gibson* (*d*); *Whitney* v. *Wilson* (*e*); and *Gleeson* v.

(*a*) [1904] 1 K.B. 188
(*b*) [1875] 1 V.L.R. 26.
(*c*) [1886] 12 V.L.R. 816, at p. 820.
(*d*) [1887] 18 Q.B.D. 537.
(*e*) [1898] 24 V.L.R. 574.

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(*f*). There was evidence as to the entry of Gambler and he running of the horse race in question quite apart from try form objected to.

tts in reply—The facts in the entry were material facts, ıt proof of which the prosecution could not have succeeded. ourt never inquires to what extent the evidence wrongly ted may have affected the minds of the magistrates: *ın* v. *Pilcher* (*g*); *Gleeson* v. *Jones* (*h*); and *Rey.* v. *lers* (*i*). The facts in the entry were not evidence; the of the horse should have been called as a witness: *n* v. *Gwenap* (*k*). (2.) In *Evans* v. *Pratt* (*l*), Tindal, C.J., ıat the Court could not take judicial notice of the meaning words "across a country." So here with the words ing price." Further, there is no course or time mentioned, o evidence of any money to be paid by the defendant. the horse did not start, so that there was no gency, and there was no evidence that the wager took before the race took place.

unsel also referred to *Read* v. *Anderson* (*m*).

DGES, J. The information complained that Boland, being ıpel-street on the 19th December, "was unlawfully in such for the purpose of money being received by him as and ıe consideration for an undertaking by him to pay fter money on the contingency of a certain horse race." ıat information he was convicted, and an order *nisi* has granted to set aside that conviction upon the ground, first, vidence was improperly admitted.

e evidence alleged to have been improperly admitted in the first place, evidence given to show that on a us date accused had been in Chapel-street, on the side of Wellington-street, and that there certain s went up to him and proposed a wager, which was ed, and that certain conversation took place as to

[1896] 22 V.L.R. 323.
[1895] 21 V.L.R. 412.
22 V.L.R. 323.
[1899] 1 Q.B. 490.

(*k*) [1830] 1 M. & Rob. 120.
(*l*) [1842] 3 M. & G. 759.
(*m*) [1884] 13 Q.B.D. 779.

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its being known when and where he could be found. It is said that evidence was improperly admitted; that it was evidence, if of anything, of another offence. In my opinion that evidence was properly received to show the purpose for which he was there, his object in being there—in the language of the information, that he was there "for the purpose of money being received by him," and so forth. The fact that he was in the street, and the fact that being in the street he received money on certain terms, does not by any means necessarily prove that he was in the street for that purpose. He might have been in the street for another and totally different purpose. It might have been mere accident; and although the evidence tendered may have been sufficient to establish another offence, it is not that fact that makes it either admissible or inadmissible. It is not admitted for the purpose of proving another offence at another time, nor for the purpose of proving he was a person likely to have committed the offence with which he is charged. It is tendered for the purpose of proving that he was in the street for a particular purpose. This subject has been recently under consideration in Great Britain in the case of *The King* v. *Wyatt* (*n*). In that case the accused was indicted for obtaining credit by means of fraud. It was proved (so far as material to the present circumstances) that defendant came to a Mrs. Williams, and asked her if she let apartments. She replied that she did. He asked her if she would take him in. She said—"For how long?" He replied—"For the night only." She agreed to take him in. Defendant asked for tea, and had a chop, bread and butter, and cake. He had a bed and a sitting-room. He stayed three days, and owed 14*s.* 6*d.*, which was not paid. That evidence was given at the trial, and the Court had no doubt that the prosecution had proved a debt, but it had doubt whether the prosecution had proved fraud. It became necessary to show that when accused obtained that credit he never meant to pay; in other words, that he obtained credit by means of fraud. Evidence was then given by an hotel-keeper and other witnesses that defendant had had apartments at their houses, and had left owing money. That evidence was given, and the man

(*n*) [1904] 1 K.B. 188.

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was convicted, and the question afterwards came before the Court, consisting of Lord Alverstone, C.J., Wright, Kennedy, Darling, and Phillimore, JJ. They held that that evidence was rightly given. The Lord Chief Justice, at p. 192, says, referring to other cases:—"These cases are clearly instances of the application of the principle that evidence of similar acts committed by the accused, at a period immediately preceding the commission of the offence, is admissible as evidence of a system practised by him." And so, here, I think the evidence as to what was done on the previous occasion was admissible for the purpose of proving his user of the street, his business in the street, the purpose for which he was in the street. I am of opinion, therefore, that the evidence was rightly received.

The next evidence objected to was evidence of what was called the entry of one of the horses. In this case, the prosecution were proving a bet on a horse race, and they were proving that a bet was made on a horse named Gambler. They called a person, who described himself as a clerk in the office of the Moonee Valley Race Club, and who produced entries of certain races. Amongst others, he produced one purporting to be an entry of a horse named Gambler, purporting to be signed, not by the nominating owner, but for the nominating owner. I now read from the depositions the objection taken, because it is that objection only I propose to deal with, and not any other possible objection. The objection is—"The entries are not made by any official person under any Statute." I think that is quite true. They are not made under any Statute, and are not admissible under any Statute. Then—"There is no Act passed to make entries of racing clubs evidence against anybody." Without any Act of Parliament making them evidence, it was an important part of the prosecution's proof to prove that, although the horse Gambler did not in fact start, it was intended that he should run—there was an idea of his running —or, at any rate, that when money was offered on Gambler, or against Gambler, or in connection with Gambler, it was not entirely an imaginary proceeding—there was some basis for it. Although the horse did not run, it was quite possible that money might be laid on it; and even if never entered, it was

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quite possible that a bet might be made in connection with it. I cannot determine, and the magistrates were not entitled to determine, this case by the result. They were only looking at the evidence for the purpose of seeing what was the meaning of the expressions used, and whether they could believe that money was laid on Gambler—that Gambler was one of the horses mentioned. In my opinion the entry was evidence for the purpose of showing that there was such a horse as Gambler, and that it was intended that such a horse should run, and so corroborate to some extent the evidence given for the prosecution, that 1*s*. had been laid on Gambler, which otherwise the magistrates might never have been able to find. There might possibly have been other objections to this document which, if taken then, might have been effectual, but those were the only objections taken at the time, and they are the only ones I propose to deal with. Therefore I think that, so far as the evidence tendered was concerned, it was admissible.

The next objection raised was that there was no evidence adduced of any undertaking to pay money. This case was argued very much as if I had to determine here what amount of money Boland undertook to pay in case the horse won. If I had in this case to determine what were the terms of the contract, and how much in the given circumstances Boland ought to pay, I might have required a good deal of evidence—for example, some evidence as to what was meant by "starting price," and so forth. But it may be quite possible to prove that a contract was made without satisfying me as to the meaning of all the terms in the contract. A contract may be made in mercantile matters which is perfectly intelligible to the persons who made it, and which expert evidence would enable a Court to understand and construe. This may be a wagering contract that requires similar evidence, and I may not be able to say precisely how much ought to be paid in the events which have happened in consequence of the 1*s*. having been wagered. But I have not to do that; I have not to construe the contract. I am not called upon to find out the meaning of its terms. I have only to say whether there was evidence that there was a contract. I think there was strong evidence of a contract or

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taking by the defendant to pay money. He is asked ctly what he pays on, and he indicates on what he does pay. you pay by the *Argus*?" He says—"Yes." "If my horse you will pay me whatever is quoted in the *Argus* on ay morning?" He says—"Yes; you will find me here." is clear and strong evidence of an undertaking by him to how much I do not know, and I have not to determine.

e next objection is that there was no evidence of any con- cy. Again, I do not know that I am called upon to say ly what the contingency was. It is fairly clear what ular contingency was intended—the contingency of the mentioned winning. Defendant on the first occasion said hat horse do you want to back?" The reply was— ledore for the Welter." And on the other occasion he was —"Let me have 1*s*. on Florist for the Pascoe Handicap," Let's have 1*s*. on Gambler for the Hurdle." That is clear. st persons' understanding. One shilling is paid. He is what are his terms, and he says that he pays according to *Argus* starting," whatever that may be. The evidence is, k, clear on that subject.

e next objection is that there was no evidence of its being certain race. I think the evidence is clear enough of a race. It is impossible to read that evidence without quite satisfied that the parties dealing knew—everybody —on what race the money was being wagered. The order e discharged, with costs.

Order nisi discharged.

licitor for the informant: *Guinness*, Crown Solicitor.
licitor for the defendant: *Potts*.

H. I. C.

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A'BECKETT, J.

1904
March 9.

AKEROYD *v.* PHILLIPS.

Health Act 1890 (*No.* 1098), *ss.* 194, 196, 197, 198, 199, 204, 214—*Vaccination—Information for failure to have child vaccinated—Defence—Certificate of vaccination after information lodged.*

The production of a certificate of successful vaccination is a sufficient defence to an information under Part IX. of the *Health Act* 1890 for failing to have a child vaccinated even though such certificate was obtained, and such vaccination took place not only after the expiration of six months from the birth of the child, but after the information was lodged.

The defendant was the father of a child which was born on 13th May 1902. No steps were taken to have the child vaccinated until 7th October 1903, when a certificate of unfitness, in the form of Schedule XV., was given by a medical practitioner, postponing vaccination till 7th December 1903. An information for failure to have the child vaccinated was lodged and issued on 9th October 1903, the hearing of which was adjourned till 11th January 1904. On 8th December the child was successfully vaccinated by a medical practitioner, who on 14th December gave a certificate to that effect in the form of Schedule XVII.

Held, that the production of this last-named certificate at the hearing was a good defence to the information.

ORDER TO REVIEW.

The defendant Henry Charles Phillips was charged on information before the Court of Petty Sessions at Hamilton "for that, on 8th October 1903, he then being the parent of a certain child born in the State of Victoria on or about 13th May 1902, and after notice in writing as prescribed by sec. 204 of the *Health Act* 1890 . . . . did unlawfully neglect to cause such child to be vaccinated according to the Act—that is to say, that he did not within six months after the birth of the said child take it, or cause it to be taken, to the Public Vaccinator for the district in which the child was then resident, for the purpose of being vaccinated, the said child not having been previously vaccinated by some legally qualified medical practitioner or some other public vaccinator."

The child in question was born on 13th May 1902 and the notices required by the *Health Act* 1890 had been duly given. No steps were taken to vaccinate the child till 7th October 1903, on which date a certificate was given by a medical practitioner in the form of Schedule XV. of the Act that the child was not then in a fit and proper state to be successfully vaccinated, and postponing the vaccination until 7th December 1903. The

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nation was laid on 9th October 1903, and was made able on the 19th October. The case was by consent rned till 17th December 1903 and came on for hearing before stices on that date, when it was again adjourned by them th January 1904. On 8th December 1903 the child was sfully vaccinated by the same medical practitioner who on December 1903 gave a certificate of successful vaccination form given in Schedule XVII. of the Act. On the date of ation the medical practitioner also made the following randum:—"Memo.—H. C. Phillips" (the child in question), 1 year and 8 months, has this day been vaccinated. He p to the present time not in a fit state to be vaccinated." nformation again came on for hearing on 11th January when all the certificates referred to were put in evidence onstituted the defence.

e justices convicted the defendant, and fined him

order *nisi* to review this decision was obtained on the ds—(1) That the Court of Petty Sessions had no jurisdic- o hear the information and to make such an order, in that formation was made more than 12 months from the time the matter of such information arose. (2) That the was wrong in making such order, inasmuch as the certifi- produced and put in evidence by the defendant at the ng were an answer or defence to the said information the provisions of sec. 214 of the *Health Act* 1890.

n the return of the order *nisi*,

ox appeared to move the order absolute.

ryant to show cause—The offence is consituted once six hs from the date of birth have expired without the child g been vaccinated, or one of the other things provided g happened. Until the six months have expired there is no ce: *Vide* secs. 194 and 204. The six months did not expire 13th November 1903. The information was lodged on 9th ber 1904, so that it was well within 12 months. As the ce was constituted on 13th November 1903 nothing that

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the defendant did or could do subsequent to that date can get rid of the offence. The certificate of unfitness and postponement of vaccination should have been obtained before the expiration of the six months. A certificate afterwards obtained cannot undo the offence which has already been committed. Nor does the certificate of successful vaccination (obtained afterwards during the currency of the certificate of unfitness and postponement) carry the defendant any further in getting rid of the offence already committed. A certificate of unfitness should have been obtained within the six months and kept constantly renewed until successful vaccination. Had that been done a certificate of successful vaccination during the currency of such a certificate of unfitness so renewed would have been a defence, but not otherwise. In the present case the certificate of successful vaccination was obtained and the vaccination took place after the information was laid.

He referred to *Fitzgerald* v. *Ratcliffe* (*a*).

Box in reply—The primary purpose of the Act is vaccination, not punishment. By sec. 214, the production of any one of the certificates mentioned in the earlier sections is a sufficient defence. What has to be proved to show an offence is not merely non-vaccination within six months of birth, but that the notice required by the Act has been sent, and has not been complied with. The offence is the non-vaccination of the child according to the notice. The twelve months within which proceedings can be taken dates from the notice: *Knight* v. *Halliwell* (*b*). Then sec. 214 says in effect:—"If you produce at the hearing a certificate that the child has been successfully vaccinated that is sufficient defence": *Vide Allen* v. *Worthy* (*c*).

(He was stopped by the Judge.)

Bryant (by permission)—There are only three defences given by sec. 214:—(*a*) a certificate of successful vaccination within six months, or within the period provided by sec. 196; (*b*) certificate extending the time beyond six months, provided that the extension or extensions therein have not expired;

(*a*) [1896] 21 V.L.R. 782; 17 A.L.T. 311.

(*b*) [1874] L.R. 9 Q.B. 412.

(*c*) [1870] L.R. 5 Q.B. 163.

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(c) the certificate of insusceptibility to vaccination under sec. 198. The public vaccinator has no power to give his certificate after the expiration of the six months or the duly extended period.

[A'BECKETT, J. According to your argument if a child were sickly, and the parent at the end of the six months goes to the public vaccinator and asks for a certificate of unfitness, the public vaccinator should not give it to him, or if he does it is of no avail.]

He should get that certificate and a consequent postponement before the six months have expired.

A'BECKETT, J. This is a point which I should have thought must have been decided before. It is an important question. If my decision is at variance with the accepted practice, the point will doubtless come up again and go to the Full Court. The matter seems to me plain. Here is an act which is intended to secure vaccination, and is intended to require vaccination within six months. It provides for prosecution in case the child is not vaccinated within six months. Then sec. 214 contains these words:—"In any prosecution for neglect to comply with the provisions of this part . . . . if the defendant produce any such certificate as hereinbefore described or the register of vaccinations kept by the registrar as hereinbefore provided in which register the certificate of successful vaccination of such child shall be duly entered the same shall be a sufficient defence."

Then I have to consider what are these certificates. Now, one of these certificates is a certificate of successful vaccination. Another is a certificate that the child is not in a fit state to be vaccinated, and that continues in force for two months. With reference to that form of certificate it is provided, as is only reasonable, that the mere production of it is not to be a defence if the time mentioned in the certificate has run out "before the time when the information shall have been laid."

Now, I think it is clear from the Act that the "certificates hereinbefore mentioned" are not limited to certificates obtained during the six months, or rather, I should say, that is my con-

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clusion. You would require to read into the section, in order to justify the limitation suggested by counsel the words "obtained within six months of birth." There are no such words there, and I think it is quite clear from the Act that the persons who are required to give these certificates are not entitled to refuse to issue them after the six months, and that you can go and get a certificate of successful vaccination after the six months, or you can get a certificate of exemption after the six months.

Then, according to counsel's argument, a parent who had obtained a certificate of successful vaccination after the six months, or a suspension of the obligation to have the child vaccinated, could be afterwards summoned and fined for the offence he had committed against the Act during those six months. He says there would not be any absurdity in that. On the other hand, it would not be an absurd construction to say that the *Health Act*, which is very strict in its provisions as to the six months, having regard to cases of innocent negligence, may have intended that if that which is the object of the Act—namely, to secure vaccination where vaccination can take place—has been effected, the certificate of successful vaccination where vaccination can take place, or the medical officer's certificate of immunity where it cannot, should be allowed as a defence. I therefore think that in this case the certificate of successful vaccination was a sufficient answer to the information. As to the other certificate, if the case for the defendant depended upon that, it would break down, but the certificate of successful vaccination is, I think, sufficient.

Solicitor for the informant: *Guinness*, Crown Solicitor.

Solicitors for the defendant: *Hill & Talbot* (for *Palmer & Son*).

J. M.

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HENRY *v.* HARPER *and Another.*

HODGES, J.

1904
May 12, 13.

Marriage Act 1890 (*No.* 1166), *Part IV., ss.* 42, 43, *etc.—Order for maintenance of illegitimate child—Failure to obey—Action for arrears—Cause of action—"Rules of the Supreme Court* 1900*"—Order XIV.*(*a*), *r.* 1*—Summary judgment.*

An order was made by justices under Part IV. of the *Marriage Act* 1890, on the complaint of the plaintiff, by which X. was ordered to pay a weekly sum to the clerk of Petty Sessions for the maintenance of his illegitimate child born of the plaintiff. X. having failed to obey the order, an action was brought after his death by the plaintiff against his executors for the arrears due on the order.

Held, on an application by the defendants for summary judgment, that the action would not lie.

APPLICATION FOR SUMMARY JUDGMENT.

This was an application on behalf of the defendants for summary judgment under Order XIV.(*a*), rule 1, in an action in which Kate Henry was plaintiff and William Benjamin Harper and Arthur Stanley Ardlie, executors of the will of Roady Carew (deceased), were defendants. The grounds of the application were: That the statement of claim disclosed no reasonable cause of action, and, alternatively, "that the action is frivolous and vexatious, and that the defendants have a good defence on the merits." The action was brought to recover the sum of 554*l.*, which was the amount alleged to be due and unpaid on an order of justices made on 17th June 1886, by which the said Roady Carew was, on the complaint of the present plaintiff, ordered to pay to the clerk of Petty Sessions at Melbourne the sum of 20*s.* weekly for the support of his illegitimate child born to him of the plaintiff, until the said child should attain the age of 13 years or should sooner die. According to the statement of claim the child lived and attained the age of 13 years on 12th October 1897, but the said Roady Carew did not make any of the said weekly payments between 15th April 1887 and 12th October 1897. The amount claimed also included the sum of 8 guineas for costs adjudged to the plaintiff by the justices' order.

The further facts appear from the judgment of Hodges, J. (*infra*).

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Isaacs, K.C. (with him *Woinarski*) for the defendant in support—The order of the justices was made under what is now Part IV. of the *Marriage Act* 1890, which also contains provisions for the enforcement of such an order. The statutory method of enforcement is the only method. At common law there is no obligation on a father to support his illegitimate child. In any case the mother cannot sue. There is no duty owed to the mother. All she could do would be to put the Statute in force. The money by the order is to be paid to the clerk of Petty Sessions, and not to the mother. Any reputable person might have obtained the order. The money is to be paid for the benefit of the child, and not for the benefit of the mother. It is not due to the mother. (He referred to *Barton* v. *Barton* (*a*); *Reg.* v. *Sturt* (*b*); *Ruttinger* v. *Temple* (*c*)). In any case the order is purely personal, and cannot be enforced against the father's executors.

Cumbrae Stewart to oppose—The clerk of Petty Sessions is a mere trustee to hand the money to the person who obtained the order. *Barton* v. *Barton* (*supra*) shows that the proper person to enforce obedience is the person who obtained the order.

[HODGES, J. You are not endeavouring to enforce the order in this action. The Statute provides how that is to be done.]

The money is really due to the mother *sub modo.*

Cur. adv. vult.

HODGES, J. This is an application to a Judge in Chambers to enter judgment for the defendant on the ground that the defendant has a good defence on the merits. It appears that the action is brought to recover an amount of over 500*l.* that is alleged to have been due from the deceased to the plaintiff, who is the mother of an illegitimate child of which the deceased was the father. It appears that in 1886 proceedings were taken under what are now secs. 42 and 43 of the *Marriage Act* 1890

(*a*) [1896] 22 V.L.R. 607. (*b*) [1868] 5 W.W. & A'B. 174.
(*c*) [1863] 33 L.J.Q.B. 1.

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for the purpose of compelling the father, who had left his illegitimate child without means of support, to pay a sum for the maintenance of that child. The plaintiff now seeks, on the order then made, to recover from the executors of the father the 1*l.* per week, which it is alleged has not been paid for many years back. There is no doubt that the order to pay the money was made. The question is whether that order gives the present plaintiff any right to recover the money. That question depends upon the construction of the order made, and on the view of the sections of the *Marriage Act* upon which that order was made.

By the order that was then made the magistrates ordered Roady Carew, for the support of the child, "to pay to the clerk of Petty Sessions at Melbourne the sum of 20*s.* weekly, week by week, which in our discretion we consider a proper and moderate allowance until the said child attain the age of 13 years or shall in the meantime die." So that it is ordered that Roady Carew should pay to the clerk of Petty Sessions 1*l.* per week for the support of the child. The terms of the order give the present plaintiff (the mother of the illegitimate child) no right to that money. It is an order that it be paid to the clerk of Petty Sessions as a contribution to the support of the child. It was, however, argued that the clerk of Petty Sessions was a mere conduit pipe for the purpose of passing that sum on to the mother, and that it was really in effect an order that there be paid to the mother 1*l.* per week through the clerk of Petty Sessions. In my opinion that is a mistaken construction of the order and of the Act.

By sec. 42, where a father leaves his child without adequate means of support, "if complaint thereof be made on oath to any justice by the . . . . mother or *any reputable* person such justice may issue his summons." A complaint may be made not only by the mother but by any reputable person. If the mother were ill or were unable to take proceedings some neighbour who knew the facts could take proceedings to obtain such order (on behalf of the child). The mere fact that a person was the complainant would certainly not entitle that person to the money, nor would it enable

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that person to go to the clerk and say—"Pay that money to me. It is mine." So that while the clerk is in some senses a trustee —and is a trustee in the sense that he has no beneficial interest in the money—he holds the money to be paid for the support and maintenance of the child, and does not hold it to be paid to the mother. That view seems to me to be very strongly borne out by the decision of this Court in *Hanley* v. *McMaster* (*d*). In that case, a complaint having been made in the first instance by one person, and an order having been obtained on it, a complaint was made by another person. The mother was dead, and there were no means of proving the paternity of the child by *viva voce* evidence, and so it was proposed to put in evidence the order obtained when another person was complainant. It was contended that the order was *res inter alios*, and not binding upon either party to the present proceeding. Higinbotham, C.J., says, at p. 326:—"It has been argued that the parties to the present proceedings and to the two earlier applications are not the same parties. But we think they are. In complaints under Part III., that illegitimate children are left without adequate means of support, the children and the alleged father are the real parties." It is not the mother and alleged father, it is not the complainant and the alleged father, it is the children and the alleged father who are the real parties. So that here the real parties were the child and the father. And, consequently, when the money was ordered to be paid it was to be paid to the clerk for the real party—the infant—and not for the mother. The case to which I was referred of *Reg.* v. *Sturt* (*e*) I think to some extent supports the same view. In that case Stawell, C.J., said—"A bastardy order is merely personal and cannot be made after the death of the father." There is something in the marginal note which would make it more nearly cover this case. But it affects this case in another way. I think it might be put that this is a proceeding now by the mother to obtain judgment for money which ought to have been paid to the clerk and passed on to her for necessaries supplied to the infant. In my opinion the answer to that is that the order is a personal order—personal to the deceased.

(*d*) [1889] 15 V.L.R. 322. (*e*) [1868] 5 W.W. & A'B. (L.) 174.

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The section I have referred to and also the section (sec. 51) which provides for the punishment of the individual who does not pay are strong to show that it is an order personally binding upon the father, and that it in no way affects his executors. As a matter of fact, in the case to which I have referred the executors had paid up to the time directed by the original order. But if they had not paid they, in my opinion, could not have been legally compelled to do so. I think it proper here to call pointed attention to the fact that it appears upon the law as it now stands that where a man is the father of an illegitimate child, and where that is proved unmistakably, and where he is unmistakably able to maintain that illegitimate child, the maintenance of that child may be thrown upon the State or charity if the father happens to die before the child is able to maintain itself. It may be that the Legislature intended that state of things. On the other hand it may be that it is an accidental omission. Judgment will be entered for the defendant, with costs.

Judgment for defendant.

Solicitor for the plaintiffs: *Gaunson & Lonie.*
Solicitor for the defendants: *Snowball & Kaufmann.*

J. M.

SYME *v.* THE UNITED VICTORIA PERMANENT BUILDING SOCIETY *and Others.*

A'BECKETT, J.
1903
Dec. 15, 16.
1904
March 15, 16, 21, 22,
April 12.

Building society—Rules—Construction—Rights of priority—Matured shareholder—Withdrawing shareholder—Stoppage of business—Recognition that business must be stopped—Rules ceasing to operate—Right to payment in full—Deduction of losses from amount at credit of shares—Alteration of rules seriously affecting particular member—Building Societies Act 1890 (*No.* 1068), *ss.* 8 (11), 28—*Arbitration clause—Jurisdiction of Court—Arbitration offered and declined.*

The fact that the interests of a particular member are more seriously affected by an alteration in the rules of a building society than those of other members does not make the altered rules invalid.

The principle of *Pepe* v. *City and Suburban Building Society* ([1893] 2 Ch. 311) and *Strohmenger* v. *Finsbury Permanent Investment Building Society* ([1897] 2 Ch. 469) applied.

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The principle of *In re Ambition Investment Building Society* ([1896] 1 Ch. 89), that before the winding-up of a society there may be a point of time after which it would be inequitable to recognize attempts to change positions and gain priorities, and that for this reason, and in view of an impending winding-up which afterwards follows, the rules may, for certain purposes, be considered as ceasing to operate from that point, is inapplicable in a case where no winding-up has taken place.

The construction of the rules of a building society as to priority of payments to shareholders, and as to deductions for losses from the amounts payable on withdrawn and matured shares, considered.

Held, that a provision for arbitration in the rules of a building society made under the provisions of the *Building Societies Act* 1890 did not *per se* oust the jurisdiction of the Court, whatever might have been urged if arbitration had been offered and declined, and an application had been made to stay the action.

The English authorities as to the character of disputes between a building society and its members which may be submitted to arbitration turn upon the special provisions of the English Act creating a special tribunal to deal with such matters, and are not authorities on the Victorian *Building Societies Act* 1890.

ACTION.

The plaintiff, Joseph Cowen Syme, sued the defendant society, its directors, James Smith, Alan Nicol, and Archibald Currie, and its manager, John Inerarity Buchan, and also the Registrar of Building Societies, claiming, *inter alia*—(*a*) a declaration that he was entitled under the existing rules of the defendant society, as against all other members of the society, as the holder of 96 unadvanced investing shares of 50*l.* each, fully paid up, to a preferential right to be paid out of assets of the society the amount paid up on such shares, together with bonuses and interest thereon, and (*b*) an order for payment of 4800*l.*, with bonuses and interest; or, alternatively to (*b*), (*c*) an injunction restraining the defendants, other than the Registrar from forwarding to the Registrar for registration copies of any resolutions for the rescission of the existing rules, or of any alteration or addition to such rules which might prejudice or affect the rights of the plaintiff under the existing rules, as the holder of the said 96 unadvanced investing shares, fully paid up, in the said defendant society, and restraining the Registrar from registering any such rules.

The facts sufficiently appear from the judgment.

The rules of the society, with the construction of which the judgment deals, were as follows :—

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Rule 101:—"When the subscriptions, interest, and profits, provided for in the rules, shall have accumulated to fifty pounds at the least for each share, such share shall be satisfied out of the funds of the Society, as provided for in Rule 108."

Rule 108:—"Members not having received an advance, who may be desirous to withdraw from the Society, shall send a written notice to the manager of such desire at least one calendar month before the first Tuesday in any month, and shall be entitled to receive the full amount of his contributions, exclusive of entrance fees and fines, together with such interest as is shown at his credit by the immediately preceding balance sheet. Such withdrawals shall be regulated as follows:—No withdrawals shall be permitted (unless in the case of the death or insanity of the member) under twelve months from the date of each member's admission respectively, provided always that payment of any debts due from the society shall, if required by the board of directors, be made before any share shall be withdrawn therefrom. The sums paid for withdrawals shall in no case exceed half the income derived from the investing shares, and withdrawn shares (not wholly subscribed for) shall be paid out according to the priority of the applicants. In case the expenses of the society, and any loss sustained by it, exceed the profit, all withdrawn shares shall be chargeable with a due proportion of such excess, and this rule shall equally apply to members cancelling their unadvanced shares previously to their taking a loan from the society, all subscriptions ceasing from the expiration of such notice, and the society shall be liablé to pay interest on the amount at the rate of 8 per cent. per annum until paid."

Rule 109:—"Next after payment of withdrawn shares to the legal representative of deceased or lunatic members, the persons holding unadvanced shares, paid up for the subscribed term, shall have the preference, and shall be paid out in full and in rotation, according to their respective subscriptions being fully discharged, subject, however, to the aforesaid deduction for excess of expenses or losses, if any, and the interest payable annually, half-yearly, or quarterly, at a rate to be fixed by the board of directors, shall be allowed to such members holding paid-up shares on the amounts respectively due to them, such interest to commence from the date of the realization of their shares respectively."

Weigall and *Guest* for the plaintiff.

Higgins, K.C., and *Davis* for the defendants, other than the Registrar of Building Societies.

No appearance for the Registrar of Building Societies.

Counsel referred to *Pepe* v. *City and Suburban Building Society* (a); *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* (b); and *Allen* v. *Gold Reefs of West*

(a) [1893] 2 Ch. 311. (b) [1897] 2 Ch. 469.

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Africa Ltd. (c), as to alteration of rules and power to reduce capital: to *In re Ambition Investment Building Society* (d); *In re Co-operative Starr-Bowkett, &c., Society* (e); *Sixth West Kent Mutual Building Society* v. *Hills* (f); and *Barnard* v. *Tomson* (g), as to the effect of stoppage of business on rights of members: to *Figgis* v. *Monsburgh* (h); *Delany* v. *The Sandhurst, &c., Society* (i); *Melbourne Permanent Building Society* v. *Taylor* (k); *Municipal Building Society* v. *Kent* (l); *Brosnan* v. *Trait* (m); and *Building Societies Act* 1890, secs. 8 (11), 28, as to arbitration: and *Wurtzburg on Building Societies* (edition of 1902), 56, 241, 309.

Cur. adv. vult.

A'BECKETT, J., read the following judgment:—The plaintiff, a shareholder in the defendant society, seeks to enforce payment in full of over 4800*l.*, representing the amount of his matured shares, against the assets of the society, which cannot pay more than 12*s.* 6*d.* in the pound to all its shareholders. The society insisted that he was bound to bear his proportion of the losses, and passed new rules, reconstructing the society, and writing down all shares by 7*s.* 6*d.* in the pound. The plaintiff says that it was incompetent for the society to pass these rules, because they deprived him of the priority which he, as a matured shareholder, was entitled to, as against withdrawing shareholders. I have to determine whether he is entitled to this priority. This depends upon the rules of the society, which present difficulties of construction of various kinds. Firstly, because the plaintiff contends that one of the most important rules affecting his position is not to be read as it is written—that when rule 101 says he is to be paid as provided for in rule 108, it should be taken to say as provided for in rule 109. Secondly, because the rules are not clearly expressed, and use terms difficult to be understood by persons not familiar with the working of

(c) [1900] 1 Ch. 656.
(d) [1896] 1 Ch. 89.
(e) [1896] 22 V.L.R. 47.
(f) [1899] 2 Ch. 60.
(g) [1894] 1 Ch. 374.
(h) [1896] 21 V.L.R. 721.
(i) [1879] 5 V.L.R. (L.) 189, at p. 192.
(k) [1896] 21 V.L.R. 716.
(l) [1884] 9 App. Cas. 260.
(m) [1903] 29 V.L.R. 280.

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building societies. Thirdly, because the rules were only workable while the society was prosperously conducting its business, and made no provision for the state of things that happened after 1893, when it virtually ceased to carry on business, received no money from shareholders, and existed merely for the purpose of getting in money from mortgagors and mortgaged property, and paying its creditors.

It started in 1875 as what is called a permanent society. It contemplated persons taking 50*l.* shares on which 5*s.* a month was payable. Interest was allowed, and a bonus over and above interest, and when by these payments of cash and allowances the shares reached 50*l.*, the shareholder was to get 50*l.* from the society. It also contemplated that shareholders might wish to retire before their shares had reached 50*l.*, and as to them it provided that they might get their money back with interest, but no bonus, after giving a month's notice. A little book in the nature of an advertisement, showing the advantages of the society, was tendered in evidence by the plaintiff. As to investors, its first paragraph says that when the subscriptions, with interest and bonus added, amount to 50*l.*, the share is matured, and the investor receives his money. The defendants objected that this book was inadmissible, and I think it was inadmissible to control the interpretation of the rules, but the defendants need not have objected, for the second paragraph says—"Shares can be withdrawn at any time, after a year from issue, on receipt of a written notice, when compound interest at the rate of 8*l.* per cent., together with the money paid, will be handed over."

These two statements may be taken to represent the expectations which a person would form as to his position on joining the society. They were fulfilled while it prospered; but in the financial crisis of 1893 it became evident that they could not be fulfilled. It is one thing to say that, in a certain event, money shall be paid, and another to provide the money. It is in the provisions for payment contained in the rules that the incoherent expressions are found which are said to give matured shareholders the right to be paid in full, though such payment may exhaust the only fund out of which withdrawing share-

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holders can be paid. Rule 101 provides that the matured shares "shall be satisfied out of the funds of the society as provided for in rule 108."

Two rules, 108 and 109, constitute a separate division of the rules, under the heading "Members withdrawing." Rule 109 deals with matured shares, and rule 108 apparently treats matured shares as withdrawals, for it says "withdrawn shares (not wholly subscribed for)." It was suggested that "(not wholly subscribed for)" referred to different shares from the plaintiffs, namely, to paid-up shares of 50*l.*, but this cannot be, for the issue of these shares was only authorized at a period subsequent to that at which this expression was first used in rule 108.

Rule 108 says that the sums paid for withdrawals shall in no case exceed half the income of investing shares. It does not say income for how long, or explain what income means, but plaintiff and defendants are agreed that it means half the cash paid in for subscriptions by investing shareholders, so that when shareholders ceased to subscribe there would be nothing wherewith to pay withdrawals. The plaintiff says that this limitation applies only to withdrawn shares, and that all the assets are applicable to pay matured shares, and therefore he is entitled to be preferred. The defendants say that the limitation applies to shares matured as well as to shares withdrawn, and they rely upon the express words of rule 101, that matured shareholders are to be paid as provided for in rule 108. So far as intention goes, I feel sure that no one with any knowledge of how building societies were conducted could have intended to limit the funds for payment of matured shares, as well as of withdrawn shares, to half the income of investing shares. The matured shares would represent large sums which would fall due from time to time at known intervals, so that provision could be made for paying them. Half of its monthly subscription could not have provided a sufficient fund for payment, and the society could not carry on its business with any hope of success without meeting its obligations to matured shareholders. The rule must, in practice, have been disregarded, or treated as confined to withdrawals of unmatured shares. It is at variance

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with all usage, and no intelligent draughtsman could have intended the consequences which a literal reading of rules 101 and 108 would entail. But as a matter of construction I must consider what I find actually provided, not what it was intended to provide, and looking, not merely at rule 101, but at the language of rule 108, I do not feel myself at liberty to reject the reference to rule 108 and substitute a reference to rule 109. But this view by no means settles the question between the parties. My judgment would be the same in result if I could read the restriction on payment from half the income as confined to unmatured shares. In any case, I should say that it did not mean that this was to be the only fund to which withdrawing shareholders could resort, so that if there ceased to be income, withdrawing shareholders could get nothing. I should regard it as a rule postponing, not extinguishing, their right to payment. On the other hand, my adoption of an opposite view to that of the plaintiff on this one question of construction leaves quite untouched other provisions of the rules clearly pointing to priority of some sort. Rule 108 provides that shares withdrawn not matured are to be put on a list, and paid out according to the priority of the applicants on that list, and rule 109, that next after payment of certain shares not in question here, matured shares "shall have the preference, and shall be paid out in full, and in rotation according to their respective subscriptions being fully discharged." On any view of rule 101, rules 108 and 109 clearly provide for a certain preference in payment as between matured and withdrawn shares. It was evidently intended that while the business of the society was conducted in the ordinary way, while it was receiving income from subscribers and making new advances, withdrawing shareholders might be kept waiting till matured shares were paid. I do not, however, think that it was the intention or effect of these rules that, when it became clear that no income would be available for withdrawing shareholders, matured shareholders should be paid out of other funds, leaving nothing for withdrawing shareholders. I think the rules can properly be read as conferring priority in order of payment out of a sufficient fund while the business was

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carried on, without conferring preference in the distribution of an insufficient fund after the business had stopped.

The rules contain one important qualification of the right to receive payment, which seems to me clearly to put the two classes of shareholders on an equal footing under the circumstances which arose in this case. I refer to the proviso in rule 108, that matured shareholders, like withdrawing shareholders, are to be subject to deduction in respect of losses by the society. The provision is most awkwardly made, and in strange language, but it is intelligible. It says—"In case the expenses of the society, and any loss sustained by it, exceed the profit, all withdrawn shares shall be chargeable with a due proportion of such excess according to the number of years such shares shall have been in force." And rule 109, as to the payment of matured shares, says "that they shall be paid out in full—subject, however, to the aforesaid deduction for excess of expenses or losses if any." The plaintiff insists on payment in full, with interest, though he does not contest the fact that there have been losses. As the society has done no new business since 1893, these losses must have arisen from loans on insufficient security made before his shares matured—losses which had been incurred, though not ascertained, when his shares matured. Since the great crash of 1893 the society has, as I have said, done practically no business. It has been getting in what it could collect by receiving rents of properties mortaged to it, selling when sales could be favourably effected, and gradually paying off its creditors. While this was being done, the society issued annual reports, putting the best face upon the situation, congratulating the shareholders that it was not as other Building Societies, which had to compound with their creditors, but clearly denoting that the only subject of congratulation was that its assets could not be snatched away by creditors, and that there would be something in the end for shareholders. Shareholders got nothing in the meantime, and in 1903 the ascertained position was that creditors were paid, and that enough was left, if carefully realized, to pay all shareholders 12*s.* 6*d.* in the pound, the plaintiff's claim being reduced with others. The effect of rule 109 on the plaintiff's position, by subjecting him to his share of losses, seems to me sufficient

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answer to his claim for priority, and sufficient justification for the passing of new rules, which disposed of it.

The only ground urged against this application of rule 109 was that the deduction could only be made while the share was in process of maturing. It was said that deductions might be made by knocking off the profits which would go to make up the 50*l.*, but that once the 50*l.* was reached it could not be reduced. I cannot read the rule thus. It applies to shares which, but for losses, would be paid off in full, and none could be paid off until the 50*l.* had been reached. It is to operate by deduction from that which has matured by reaching 50*l.*, not by deduction from the accretions going to make up the 50*l.* Of course, if a matured share had been paid off, there would have been an end of it. No matter what losses were subsequently discovered, nothing could be got back from the shareholder. The same observation would apply to the case of a withdrawing shareholder, but so long as withdrawn shares and matured shares remained unpaid, both classes remained subject to deduction for losses.

The plaintiff applied for payment years ago, when his shares matured, but did not press for it probably because outside creditors had to be first satisfied, and he could not claim priority over them. The rules seem to contemplate a matured shareholder having to wait for payment as well as a withdrawing shareholder. The concluding provision of rule 109 looks like it, and I should say that a withdrawing shareholder having to wait would also be entitled to interest from the society if solvent.

Coming now to the position of the society before the new rules were passed, it was one of great difficulty. Putting the case most favourably for the plaintiff, his claim was of questionable validity. If it were valid it would give preference to another shareholder on the same footing as himself, and the principle of construction he insisted upon would apply to the priorities of the withdrawing shareholders, *inter se.* Some of them might claim to be paid in full, according to priority of application, under rule 108, leaving little or nothing for those lower down on the list. A more inequitable mode of dividing assets between shareholders, who had been patiently waiting for years, could not be imagined, unless the rules had distinctly

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provided for it. The rules were perplexing and uncertain, and the assent of the requisite majority to an alteration of the rules in the way proposed was to ordinary apprehension the fairest and most reasonable outlet from a position in which various interests conflicted. Undoubtedly the plaintiff was the person most deeply interested, and if the new rules passed would lose a right which he might have thought he had honestly acquired. but it could not be said that the new rules were proposed merely with the object of depriving him of that to which he claimed to be entitled. The fact that his interests were more seriously affected by the new rules than those of other shareholders would not make the rules invalid: See *Pepe* v. *City and Suburban Permanent Building Society* (*n*); *Strohmenger's Case* (*o*). I think the defendants are entitled to judgment. I have come to this conclusion without considering the declaration of construction referred to in paragraph 20 of the defence. I disregard it.

I also wish to say that I consider the case of the *Ambition Building Society* (*p*), referred to in argument, to be inapplicable to the facts before me, by reason of there having been no winding-up. The case is no authority for saying that at a certain point in the affairs of a society, when its inability to carry on business or to pay its creditors is apparent, the rules cease to be operative, and may be disregarded; it merely says that before a winding-up, which fixes rights and priorities, there may be a point of time after which it would be inequitable to recognize attempts to change positions and gain priorities, and that for this reason, and in view of an impending winding-up which afterwards follows, the rules may for certain purposes be considered as inoperative from that point. I have not to consider here what would have happened, or what priorities would have prevailed if the assets of the society had been administered under a winding-up order. The effect of such an order has been judicially described as a *vis major*, which cuts off all chance of profit, and terminates the account of each shareholder. Here there has been no *vis major*—no outside pressure. The society has been left undisturbed for years in its

(*n*) [1893] 2 Ch. 311.
(*o*) [1897] 2 Ch. 469.
(*p*) [1896] 1 Ch., p. 93.

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efforts to discharge its liabilities, and to do justice to its shareholders in its own way. This process admits of adjustments very different from those which are necessary to accomplish the summary distribution of assets and settlement of all claims which is required by a winding-up order.

I should notice a ground of defence raised by paragraph 21 —that having regard to rule 117 as to referring disputes to arbitration, the Court had no jurisdiction to deal with this action. I agree with the plaintiff's argument upon this objection, that, whatever might have been urged if arbitration had been offered and declined, and an application had been made to stay the action, the provision for arbitration, standing alone, does not prevent the Court from dealing with what is here submitted to it. The English authorities, which go very far as to the character of the disputes which must be submitted to arbitration, are not authorities on our Act. They turn upon the special provisions of the English Act creating a special tribunal to deal with such matters. This is shown very clearly by *Hack* v. *London Provident Building Society* (q). I give judgment for the defendants, with costs.

Judgment for defendants.

Solicitors for the plaintiff: *Smith & Emmerton.*
Solicitor for defendants: *Jennings.*

H. I. C.

In the Will of ROFE.

A'BECKETT, J.
1904
April 21.

Administration and Probate Act 1890, *ss.* 39, 40—*Exemplification of probate—Probate granted in New South Wales to three executors—Application for re-sealing by one only.*

Where probate has been granted in another State to three executors, all of whom still hold the office of executor, they must all join in an application for sealing exemplification of the probate in Victoria under sec. 40 of the *Administration and Probate Act* 1890.

In the Will of Vivian ([1901] 23 A.L.T. 37) distinguished. The Court in such a case granted probate of an exemplified copy of the will to one executor, reserving leave to the others to come in.

APPLICATION.

This was an application under sec. 40 of the *Administration*

(q) [1883] 23 Ch.D. 103, at pp. 108–114.

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A'BECKETT, J.
1904
IN THE WILL OF ROFE.

and Probate Act 1890 for the sealing of exemplification of probate granted by the Supreme Court of New South Wales of the will of Alfred Rofe deceased, or in the alternative for probate of an exemplified copy of the will. Probate of the will had been granted in New South Wales to the three executors named therein. The present application was made by one only of the executors, the other two executors refusing to apply for re-sealing in Victoria on the ground of expense. The New South Wales estate was valued at 245,879*l.*, while the Victorian estate was worth only 104*l.* The registrar took the objection that under sec. 40 of the *Administration and Probate Act*, where probate has been granted to several executors, they must all join in the production of the probate on an application for re-sealing, and referred to the Court the question whether either application should be granted.

Macfarlan in support—The case is covered by the judgment in *In the Will of Vivian* (*a*). There the application was made by one executor only, a third person having been substituted by the New Zealand Court for the second executor. But this Court took no notice of the latter fact, so that the position was that only one of the executors named in the probate applied, though they were both alive.

A'BECKETT, J. Looking at sec. 40 of the *Administration and Probate Act* 1890, I think that the registrar's objection to the re-sealing is a good one. I think I can uphold that objection without overruling or deciding anything necessarily inconsistent with *In the Will of Vivian* (*a*). Where two executors have taken out probate, I would not say that, supposing one died, the order for re-sealing could not be made on the application of the survivor. Vivian's case was very like that, because one of the executors had gone out of it, so to speak. Here these other executors are performing their functions, and the effect of granting the order would be to put upon these other executors, who are not parties to this application, certain duties and liabilities as executors in Victoria. I see no objection, however,

(*a*) 23 A.L.T. 37.

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to granting the alternative application, which is for probate of an exemplified copy of the will, reserving leave to the other two executors to come in and prove.

A'BECKETT, J.
1904
IN THE WILL OF ROFE.

Proctors for applicant: *Croft & Rhoden.*

J. M.

LAST CHANCE UNITED GOLD MINING COMPANY NO LIABILITY *v.* THE BRITANNIA UNITED GOLD MINING COMPANY NO LIABILITY.

F.C.
1904
March 2.

Mines Act 1890, *ss.* 244, 249, 267—*Order for inspection—Jurisdiction of warden to to make second order.*

A warden has jurisdiction under sec. 244 of the *Mines Act* 1890, on proper materials, to make an order for inspection as often as he may think fit. The fact that he has already made an order for inspection, and that such order has been acted upon, does not deprive him of jurisdiction to make another order or orders in favour of the same applicant for inspection of the same mine.

ORDER *nisi.*

This was an order *nisi* under sec. 267 of the *Mines Act* 1890 calling upon a warden of goldfields and the Last Chance United Gold Mining Co. No Liability—the respondent herein—to show cause why a question of law should not be reserved for the opinion of the Supreme Court.

The respondent company had on 29th June 1903 on an *ex parte* application supported by affidavits setting forth the facts on which it was made, obtained from the warden of goldfields at Ballarat an order under sec. 244 of the *Mines Act* 1890 for the inspection of the workings of the Britannia United Gold Mining Co. No Liability—the applicant herein—adjoining those of the respondent, for the purpose of ascertaining whether the applicant was encroaching on the respondent's land, and had in fact acted upon such order. On 6th October following, the respondent, on affidavits setting out fresh materials, obtained from the warden another order for the inspection of the applicant's workings. The applicant thereupon applied to the warden to set aside or stay the execution of the second order for inspection. Both parties were represented

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on this application, and the applicant requested the warden to reserve for the Supreme Court the question whether he had jurisdiction to make a second order for inspection. The warden having refused to do so, or to set aside the order of 6th October, the applicant obtained an order *nisi* calling upon him and the respondent to show cause why the following questions of law should not be reserved for the opinion of the Supreme Court:—

(1.) That, having made an order for inspection on 29th June, the warden had no jurisdiction to make the order of 6th October.

(2.) That, having obtained an order for the purpose of ascertaining whether any encroachment had taken place, and having proceeded thereunder and ascertained that an encroachment had taken place, the respondent company could not obtain a second order *ex parte* for the purpose of ascertaining whether any further or other encroachment had taken place.

On the return of the order *nisi* it was referred to the Full Court.

H. S. Barrett for the applicant to move the order absolute.

Goldsmith to show cause, after stating the facts, was stopped.

H. S. Barrett in reply—The warden having once made an order for inspection, he is *functus officio* under sec 244. Where a power of this kind is given to an inferior court it can only exercise it once unless the right to exercise it as often as it thinks fit is expressly given. The inspection is given for the purpose of ascertaining whether encroachment in fact has taken place. Once that is ascertained inspection cannot be had again for the purpose of ascertaining the extent of the encroachment, or whether there has been an additional encroachment: *Attorney-General* v. *Lansell* (a).

A'BECKETT, J., delivered the judgment of the Court [A'BECKETT, HODGES, and HOOD, JJ.] We feel no doubt about

(a) [1880] 6 V.L R. (E.) 134.

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A'Beckett, J.

this case. The question or point raised which led to this case being reserved, is, that it was contended that the jurisdiction of the warden under this section is exhausted by one order for inspection. We see nothing in the section to limit his jurisdiction in this respect, and the consequences of so doing would be most undesirable and absurd. Therefore we have no doubt that there is power to make a second order. In saying that, we do not mean that where on certain materials an order has been made and acted upon, and may be said to be exhausted, that the person who obtained that can on the same materials say—"Now I want another order." But there is nothing in the section to prevent the warden from exercising his jurisdiction as often as circumstances may seem to him to require. The order will be discharged, with costs.

Order discharged.

Solicitor for applicant: *H. S. Barrett.*

Solicitors for respondent: *Phillips & Clarke* (for *Pearson*, Ballarat).

J. M.

In re ELLEN KAY (*an Infant*), *Ex parte* DAVIS.

MADDEN, C.J.

1904 *February* 4, 16, 23.

Neglected Children's Act 1890 (*No.* 1121), *ss.* 25, 29, 30—*Regulations* 102, 108—*Power to demand back child boarded out—Religion of parent—Habeas corpus.*

A., a ward of the Department for Neglected Children, had been placed with X. under sec. 30 (5) of the *Neglected Children's Act* 1890 and the regulations thereunder. On the recommendation of the secretary, indorsed by the minister, A. was handed over to Y.:

Held, that the secretary could not of his own motion afterwards demand that the child be handed back to the custody of the department.

Per MADDEN, C.J. The secretary under sec. 30 (5) has a right to place a ward with any suitable person willing to take it. Once he has so placed it he cannot demand it back unless the Governor in Council or the Minister orders it.

HABEAS CORPUS.

In February 1901 Ellen Kay, who was then 14 days old, was committed under an order of justices to the care of the Department for Neglected Children, and was by the department handed to the respondent, Mrs. Bignell, to be nursed. The mother of the child, who was unmarried, was a Roman Catholic. By

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regulation 102 of regulations made in pursuance of the *Neglected Children's Act* 1890 (No. 1121) it is provided that "Protestant children shall be boarded out, placed with, or apprenticed to Protestant persons only, and Roman Catholic children with or to Roman Catholics only, and so with other creeds. Provided that if within two months after becoming eligible for service there be no application for a ward from fit persons of the same creed, or if under special circumstances it be deemed expedient for the welfare of any ward, such ward may be placed or boarded out with an approved applicant or person of some other creed who shall undertake to provide facilities for the due performance of and instruction in the religious duties of the denomination to which such ward shall belong."

Regulation 108 provides—"The Minister may remove or direct the removal of children boarded out at any foster home at any time he considers it necessary or expedient." In accordance with this regulation the child was placed with a Mrs. Lowther, a Roman Catholic, and remained with her for a few weeks. Mrs. Bignell, who had become attached to the child, applied to the department for permission to adopt the child, expressing her desire to keep and provide for it without remuneration. The secretary asked Mrs. Lowther whether she would keep the child without remuneration, and she was informed that if she were unwilling to do so the child would be placed with Mrs. Bignell. On Mrs. Lowther declining to retain the child on these conditions, the secretary recommended that the child should be handed over to Mrs. Bignell in accordance with her offer. The Minister indorsed this recommendation, and the child was accordingly handed over to Mrs. Bignell. In October 1903 the secretary of the department called upon Mrs. Bignell to hand the child back to the department, and on her refusing to so do obtained a writ of *habeas corpus*.

Mrs. Bignell in her return to the writ set out the above facts, and produced the child to the Court.

Sir Bryan O'Loghlen, K.C., for the applicant.

Kaufmann, for the respondent, referred to the following

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cases:—*Re Goldsworthy* (*a*); *Re Mary Turner* (*b*); *Queen* v. *Gyngall* (*c*); *Andrews* v. *Salt* (*d*).

MADDEN, C.J. In my opinion there is no doubt whatever about the law in this particular case. When I last heard it I did not know that the Minister had done what he had in fact done. What I thought it was wise to afford him an opportunity of doing was to cause an Order in Council to be issued directing that this child, notwithstanding any likely differences of religion, should remain with Mrs. Bignell. The Minister is the only person who has an absolute right to interfere between these persons, and it now appears that he, some time ago, did the very thing which I thought he might possibly desire to do. The position is a plain and simple one. All that has been said on behalf of the applicant as to the desirability of confining the provisions of an Act like this within strict limits, having regard to the religious beliefs of the people, is most true. The Act itself, while not providing for any regard to, or consideration for, religious belief in the children, has authorized regulations, and the regulations themselves have made the most wise and proper provision that, other things being equal, the child of a parent of any particular denomination ought to be given to a foster-mother of that denomination. A moment's contemplation of the subject of the regulations shows how ridiculous it would be, if the people of a child's supposed denomination will not accept the custody and wardship of the child, that children of that denomination should go nowhere, and be for ever housed in this department because their own people would not take them. Obviously, regulation 102 provides that *primâ facie* a child ought to be given to a foster-mother of its own supposed denomination, and effort is to be made to see that that is done, and if that cannot be done, and whether it can or not, if it be expedient in the opinion of the secretary for the child's welfare that it should be given to the custody of a person of another denomination, the secretary may so give it. The matter is hedged round with all sorts of cares

(*a*) [1876] 2 Q.B.D. 75.
(*b*) [1872] 41 L.J.Q.B. 144.
(*c*) [1893] 2 Q.B. 235.
(*d*) [1873] L.R. 8 Ch. 622.

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and cautions. Sec. 25 provides that the secretary becomes sole guardian of the child until it attains a certain age, and he may deal with the child as directed by the Act and the regulations of the Governor in Council in force thereunder. He is the person who has the sole right to deal with it subject to the Act and subject to the regulations.

It appears that this child had been nursed by Mrs. Bignell, and was afterwards given over to Mrs. Lowther, who was of its own supposed persuasion. Mrs. Lowther was not willing to accept it without payment, and Mrs. Bignell was desirous to get the child and to rear it at her own cost, and through Mrs. McKinnon, the correspondent of the local committee, she made application for the child. Mrs. McKinnon then had the application forwarded to the secretary. The secretary considered the application, and appears by the official file to have recommended that, as Mrs. Lowther would not consent to take the child without remuneration, the child should then be given over to Mrs. Bignell, who was a respectable woman likely to do the best for it. He, in other words, expressly points out that it would be for the child's best interests that it should be given to Mrs. Bignell. The matter was submitted to the Minister, and the Minister authorized it according to law. Beyond all doubt she is entitled to hold the child until that contract is determined according to law. Neither Act nor regulations contemplate any such position as that, without any ground whatever, but on mere caprice, the secretary could demand the child back, although the foster-mother might have been at all sorts of expenses in connection with it. The secretary now says—"I gave this child to you; hand it back to me." I do not know whether it is necessary to determine whether he has a right to take back a child whom he has handed to a foster-mother. I do not care which of those words which have been referred to be used—"nursed," "fostered," or "adopted." Counsel says the child cannot be "adopted." In the sense he is thinking of, that may be so. I do not think a child could be given out for adoption in the ordinary sense of "adoption." Howsoever you call the custody of the child, that custody may be given either

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to foster a baby—a young and helpless child—or to take a child within the statutory years as a member of the family, and the custody remains, subject to the Act and regulations, and subject to the power given to the proper officers on good grounds to terminate that custody.

What is that right? I do not think that the secretary has the right, having once parted with the child, to order it to be given back, but it is quite clear the Governor in Council, having satisfied himself that there is any impropriety, may order the custody back to the department, and under regulation 108 the Minister himself, if he is satisfied that good reason exists, may do so of his own motion. He would have good reason for such an interference, and he would not upon mere caprice make such an interference with constituted regular rights to the custody of children arising by contract. The Minister, though he has the right, has not exercised it. It is said that he has not that right; that the regulation relates to "foster children," and that this one was "adopted." The Act uses those terms in the same sense whenever the child is in the custody of any custodian who will care for it. It all means the same thing. In reality it makes no difference which of those particular terms is used. The secretary, under sec. 30, has the right to place it with any suitable person willing to take it. That was done Before doing it himself, he got the Minister's approval. The secretary now personally seeks to get the child back for no cause at all, so far as appears. I don't think he can do that. I think he could do that only if the Governor in Council or the Minister chose to order it. Until one or the other of them chooses to do so, it would be most unjust and very unfair—it would be simply breaking this contract to pieces—to order her to give the child back, and that is what it is attempted to do on this present occasion. The order *nisi* will be discharged, with costs.

Order nisi discharged.

Solicitor for applicant: *Guinness*, Crown Solicitor.
Solicitors for respondent: *Snowball & Kaufmann.*

J. M.

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1903
November 5.

TREGANOWAN *v.* SHIRE OF MINHAMITE.

Vermin Destruction Acts, 1890 (*No.* 1153), *ss.* 4, 7, 14, 15; 1901 (*No.* 1770), *s.* 4—*Owner or occupier of "lands"—Whether "lands" include "roads"—Liability of municipality to destroy vermin on roads.*

There is no duty cast upon municipalities by the *Vermin Destruction Acts* to keep its roads, culverts, &c., within the municipal district free from vermin.

Semble, the duty is thrown upon the owners or occupiers of the property adjoining the road in the case of private property, or the Board of Land and Works where there is no private owner or occupier of the adjoining land.

ORDER TO REVIEW.

The defendant, the Shire of Minhamite, was charged in the Court of Petty Sessions at Port Fairy on the information of Thomas James Treganowan, an inspector, under the *Vermin Destruction Act* 1890 for "that the defendants, between 7th May 1903 and 25th May 1903, has failed to take all practicable and reasonable means to destroy all vermin upon land, on which were erected bridges, culverts, and embankments, owned or occupied by the defendant, and particularly in and upon the said bridges, culverts, and embankments," after due notice served upon it by the inspector who had found vermin on the land on which the bridges, &c., were erected.

From the evidence it appeared that the notices had been duly served on the defendant, that there were rabbits in the bridges, embankments, and culverts mentioned, which were on and formed part of roads within the municipal district of the defendant. It was also shown that the defendant had failed to obey the notice requiring it to destroy such vermin.

The justices convicted and fined the defendant.

An order *nisi* was obtained to review this decision on the grounds (*inter alia*)—(1) that the information disclosed no offence; (2) that the defendant is not the owner or occupier of the said roads, bridges, &c., within the meaning of secs. 7, 14, and 15 of the *Vermin Destruction Act* 1890; (3) that the said roads, bridges, &c., are not "land" within the meaning of the said sections.

On the return of the order *nisi*, Hodges, J., referred it to the Full Court.

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Cussen (with him *Davis*) to move the order absolute.

Starke (with him *Isaacs, K.C.*) to show cause.

Cussen in reply.

The arguments sufficiently appear from the judgments delivered.

HOLROYD, J. We think that the argument of counsel for the defendant in this case is correct, viz.—that throughout the Act a clear distinction is drawn between "lands" and "roads" —that "land" does not include "roads" as it is generally used—that land which is to be kept free from vermin is land which is capable of being owned or occupied—that roads which adjoin such land are to the extent of one-half of their width to be kept free from vermin by the owner or occupier of the adjoining land, and that those owners or occupiers who are aimed at are private persons and not municipalities at all.

I am reminded that if it were desired to put the burden on municipalities of keeping roads free from vermin nothing would be easier. Parliament could distinctly have said so. The argument for the informant was to this effect—that there are no less than four bodies or parties who are be called upon to keep roads free from vermin, and that if one does not keep the road free from vermin another may be required to do so. That, we think, seems to be contrary to the whole scope of the Act, which means exactly what it says—viz., that the owner or occupier is to keep all the land he possesses free from vermin. The whole of the roads, as far as I can understand, might be in no municipality, but they must adjoin private property or be vested in the Board of Land and Works. The owners or occupiers of that private property or the Board of Land and Works would have the duty of acting in obedience to the Act in respect of the whole of the land in the State. The order will be absolute, with costs.

A'BECKETT, J. I concur.

HOOD, J. I wish to add that the Act seems to provide for everything. It provides for clearing Crown land, for clearing

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private land, and for clearing roads at the side of such land. Having done that, counsel for the informant wishes us to say that there is an implied duty cast upon municipalities to clear roads as well as the express duty cast upon the owners of adjacent lands. I think that is erroneous.

Order absolute.

Solicitor for informant: *Powling* (Port Fairy).

Solicitors for defendant: *Hill & Talbot* (for *Palmer & Son*, Hamilton).

J. M.

MADDEN, C.J.
1903
June 24, 25, 29.
F.C.
December 3, 4, 7.
1904
April 13.

BREE *v.* SCOTT.

Real Property Act 1890 (*No.* 1136), *ss.* 17, 18, 19, 23—*Transfer of Land Act* 1890 (*No.* 1144), *ss.* 119, 124, *etc.*—*Land Act* 1869 (*No.* 360), *Part II.*—*Action for recovery of land—Adverse possession—Crown licence followed by Crown grant—Time running against Crown — Limitation of action — Mortgagor and mortgagee—Transfer of first mortgage—Transfer not shown on certificate of title—Right of transferee to bring ejectment—Tenancy at will.*

A. was, prior to 1878 and up to 1885, the Crown licensee of land under the *Land Act* 1869. In 1878 the defendant entered into adverse possession of the land, and had remained in possession ever since. In 1885 a Crown grant of the fee issued to A, "in pursuance of the *Land Act* 1869." A. transferred to B., to whom a certificate of title under the *Transfer of Land Statute* issued. B. gave a first mortgage of the land to C. C. transferred this mortgage to the plaintiff. The instrument of transfer was registered under the *Transfer of Land Act* 1890, but this transfer was not shown in any way on the certificate of title. B. also gave a second mortgage over the same land to the plaintiff. In an action for the recovery of the land,

Quære (*per* MADDEN, C.J.), whether the plaintiff could sue in ejectment unless either a transfer to him of the first mortgage or a discharge of such mortgage be shown on the certificate of title.

Held (by MADDEN, C.J., and by the Full Court on appeal), that the right to bring an action for the recovery of the land first accrued to plaintiff's predecessors in title in 1878, and therefore became barred in 1893.

ACTION FOR THE RECOVERY OF POSSESSION OF LAND.

The land the subject of this action (allotment 21, parish of Carchap) had some time prior to 1874 been "selected" under the *Land Act* 1869 by Helen M'Intyre, the mother of Mary Johnson Scott the defendant in this case. The defendant

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entered into possession of the land in 1876, or at the latest, as found by the Chief Justice, in December 1878, and had continued in possession up to the date of this action.

On 16th February 1885 a Crown grant of the land was issued to Helen McIntyre "in consideration of 320*l.* duly paid, and in pursuance of the *Land Act* 1869." On 29th August 1885 Helen McIntyre transferred to her son Mathew McIntyre, and on the same day a certificate of title issued to the latter.

On 26th June 1896 Matthew McIntyre gave a first mortgage over this and other land to the British and Australasian Trust and Loan Company to secure the sum of 5500*l.* advanced to him by the mortgagee. This mortgage was duly registered and shown on the certificate of title to allotment 21 by indorsement of 8th July 1896.

On 23rd September 1897 Mathew McIntyre gave a second mortgage over the same lands to Robert Stapylton Bree, the plaintiff in this action, to secure the sum of 2500*l.* advanced by the latter. The second mortgage was registered and shown on the certificate of title to allotment 21 by indorsement of 30th September 1897.

On 17th June 1899 a deed of indenture was made and executed by Mathew McIntyre, of the one part, and the defendant of the other part, wherein it was recited "Whereas allotment 21 of the parish of Carchap was some years since transferred to the said McIntyre as a trustee for Mary Johnston Scott, but no deed of trust with reference to the same was executed, as the parties hereto severally admit, and whereas [the indenture then recited the fact of the mortgages to the British Loan Co. and to Bree, and proceeded] and whereas the said Mary Johnston Scott is now, and has been for many years, residing on the said allotment 21, and hath requested the said Mathew McIntyre to execute and carry into effect the trust upon which the same allotment was transferred to him, and he being unable to do so, hath agreed to assign to the said Mary Johnston Scott his interest in the moneys to be produced by a sale of the lands included in the said mortgages, so that the same may be a security to her to the extent of 800*l.*, the estimated value of such

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allotment, now this indenture witnesseth that in pursuance of such agreement and in consideration of the premises . . . . he, the said McIntyre, doth assign, transfer, and set over to the said Mary Johnston Scott . . . . all his right, title, interest and equity in the said lands included in the said mortgages and to the moneys to arise from the sale thereof . . . . to the intent and purpose that after the claims of the said mortgagees in respect of their said mortgages shall be paid and satisfied the said lands and moneys to arise from the sale of the same shall stand and be a security (to the defendant) for the sum of 800*l.*" Then followed an appointment of defendant as McIntyre's attorney to demand, account, and sue for and receive any balance remaining after judgment of the said mortgage debts in the event of sale.

On 14th July 1899 the defendant sent to the British and Australasian Trust and Loan Company and to Bree (the plaintiff) a notice of which the material parts were as follow:—"You and each of you are required to take notice that by indenture bearing date 17th June 1899, made between Mathew McIntyre, of the one part, and Mary Johnston Scott of the other part, for the consideration therein mentioned, the said Mathew McIntyre did thereby assign, transfer, and set over to Mary Johnston Scott . . . . all his right, title, interest, and equity in and to all the lands included in certain mortgages given by him to you over certain lands situated in . . . . and over allotment 21, parish of Carchap, and to the moneys to arise from the sale of the said lands; and, further, take notice that the said Mathew McIntyre did thereby authorize the said Mary Johnston Scott to demand . . . . full accounts of all moneys owing by you, or to be received by you, and on non-compliance to take all steps, etc."

The plaintiff subsequently paid off the first mortgage, and obtained from the British and Australasian Trust and Loan Company a transfer, dated 14th November 1902, of its mortgage. This transfer was registered under the *Transfer of Land Act*, but plaintiff had not taken the additional step of having the transfer to him of the first mortgage shown on the certificate of title.

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The certificate of title as put in evidence read :—

"Vol. 1732, Fol. 346,312. 29th August 1885.

"Certificate of Title to Mathew McIntyre, of etc., of Allotment 21, Parish of Carchap. . . ."

(Indorsed)

"Mortgage, 8th July 1896, Mathew Copeland McIntyre to the British, etc., Loan Company, No. 172,279.

"Mortgage, 30th September 1897, Mathew McIntyre to Robert Stapylton Bree, No. 180,127."

Default having been made in the payment of principal and interest, the plaintiff on 19th January 1903 served on defendant and her husband a notice which was headed "In the matter of an Instrument of Mortgage No. 180,127 (McIntyre to Bree)," and the material parts of which were :—"I, Robert Stapylton Bree, being the registered proprietor of a mortgage numbered 180,127 from Mathew McIntyre over *inter alia* . . . . allotment 21 parish of Carchap . . . . to secure payment of 2500*l.* and interest at the rate and upon the days in the said instrument of mortgage provided and the said McIntyre having made default in payment do hereby give you and each of you notice . . . . to grant and deliver up possession to me of . . . . allotment 21, etc. — (Signed) ROBERT STAPYLTON BREE." This was the only notice to quit disclosed by the evidence. The defendant having refused to deliver up possession, the writ in the present action was issued.

By his statement of claim the plaintiff claimed that "he is and at all times material has been the registered proprietor of a first and second mortgage under the provisions of the *Transfer of Land Act* dated respectively, etc., over allotment 21, parish of Carchap, of which land Mathew McIntyre was and is the registered proprietor," and alleged that default had been made in payment of principal and interest under both mortgages; that the plaintiff was entitled under the Act to possession of the land; that the defendant had wrongfully entered into possession of the land, and though requested so to do had refused to give up possession. The plaintiff claimed—(1) Possession; (2) mesne profits.

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By her defence the defendant alleged—(1) She is in possession by herself of the said land. (2) She is and has ever since the year 1878 or thereabouts been in the actual possession and enjoyment continuously and exclusively of the said land, and she will rely on the provisions of Part II. of the *Real Property Act* 1890; whereon the plaintiff joined issue.

The material facts so far as not above set out sufficiently appear from the judgment of Madden, C.J. (*infra*).

Davis for the defendant—The evidence shows that the first mortgage has been paid off. But though that is so it is not discharged—it is still a subsisting mortgage—and the legal estate remains in the first mortgagee until a discharge takes place. The certificate of title on its face shows the British Co., and not the plaintiff, as the first mortgagee.

[MADDEN, C.J. Under the old system, if you had attempted to set up those facts equity would have granted an injunction against you, because it would be against good conscience. Your point comes to this, that though plaintiff has possessed himself of all the equity to have this land, yet because a formal provision has not been complied with he is not entitled to succeed.]

To enable anyone to maintain ejectment he must have the legal estate. A second mortgagee could not have maintained ejectment—the first mortgagee was the only one who could bring it. The position here is that the first mortgagee has been paid off.

[MADDEN, C.J. He has all the rights which the holder of the legal estate formerly had.]

The only person who has the rights of the owner of the legal estate is the first mortgagee: *Vide* secs. 119 and 124 of the *Transfer of Land Act* 1890. Until the first mortgage is got rid of by registration of a discharge the rights under the first mortgage are vested only in the first mortgagee. The first mortgage can only be got rid of by registration of a discharge. (He referred to *Taylor* v. *Wolfe & Co.* (*a*).) Assuming the first mortgage to be a subsisting mortgage, notice is necessary to determine the possession of the mortgagor. No such notice has

(*a*) [1892] 18 V.L.R. 727.

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been shown to have been given under the first mortgage; the only notices given purport to be under the second mortgage. Here there is an attornment of the mortgagor as tenant to the first mortgagee. There is a yearly tenancy created.

[MADDEN, C.J., referred to sec. 24 of the *Real Property Act* 1890.]

That refers to a lease not in writing. This lease is in writing. There is no proof of any default in payment of rent: *Robbins on Mortgages*, vol. i., p. 734.

[MADDEN, C.J., referred to *Paterson* v. *McCarthy* (*b*); *Farrington* v. *Smith* (*c*); *Danby* v. *Lavington* (*d*); *Staughton* v. *Brown* (*e*).]

[*Pigott* referred to *Kelly* v. *Uren* (*f*); *Doe* v. *Liversedge* (*g*).]

There is no evidence of any default at all under the first mortgage.

[MADDEN, C.J. The plaintiff here is entitled to possession in equity. He is entitled to go up to the Office of Titles to-morrow and ask to have the first mortgage written off.]

That is so, but until he does so the first mortgage exists. In any case the evidence is clear that the defendant has been in adverse possession for more than 15 years.

(He was stopped on this point.)

The arguments both for plaintiff and defendant on the question of adverse possession are sufficiently set out in the judgment of Madden, C.J., *infra*.

Pigott for the plaintiff referred to the following cases:— *Bank of Victoria* v. *Forbes* (*h*); *Vaughan* v. *Shire of Benalla* (*i*); *Vinnicombe* v. *MacGregor* (*k*); *Foley* v. *Egan* (*l*).

[MADDEN, C.J., referred to *Warren* v. *Murray* (*m*); *Reg.* v. *Board of Land and Works* (*n*); *Darby and Bosanquet on the Statute of Limitations* (2nd ed.), pp. 355 and 552.

(*b*) [1892] 18 V.L.R. 133.
(*c*) [1894] 20 V.L.R. 90.
(*d*) [1884] 13 Q.B.D. 347.
(*e*) [1875] 1 V.L.R. (L.) 150.
(*f*) [1898] 19 A.L.T. 250.
(*g*) [1843] 11 M & W. 517.
(*h*) [1887] 13 V.L.R. 760.
(*i*) [1891] 17 V.L R. 129.
(*k*) [1902] 28 V.L.R. 144.
(*l*) [1891] 17 V.L.R. 340.
(*m*) [1894] 2 Q.B. 648.
(*n*) [1869] 6 W.W. & A'B. (L.) 38.

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Davis in reply referred to *Booth* v. *Alcock* (*o*); *Kemp* v. *Gibbon* (*p*); *Dryden* v. *Dryden* (*q*); *Bethune* v. *Porteous* (*r*); *Land Act* 1890, sec. 30, etc.

MADDEN, C.J. This is an exceedingly interesting case, and has been well argued. It is remarkable both in its simplicities and its difficulties. Apart altogether from the complication as to whether or not land which has been granted by Crown grant in pursuance of the selection section of the *Land Act* 1869 can be the subject of adverse possession during the years during which the person who selects under the *Land Act* is in occupation, or supposed occupation, until the time when he gets a Crown Grant—that question presents many difficulties—but apart from that the case is exceedingly simple. But that point being introduced, it becomes difficult—so difficult that at one time I was disposed to reserve this point for the Full Court. But the view I take of reservations to the Full Court is this, that they necessarily impose on the parties the costs, or the equivalent of the costs, of an appeal. The parties ought themselves to be allowed to be the judges whether they will incur these costs. It will cost them no more if they appeal, and they are entitled to have the opinion of the Judge of first instance. If they are minded to take it to the Full Court they may go there themselves. If they do not want to go they will not be at the costs of going. They must come here in the first place. On the other hand, if they choose to appeal that is their business. I have therefore resolved to myself deal with the case.

It stands thus:—The plaintiff Bree is, or was, the second mortgagee of McIntyre, the transferee of the Crown grantee of this land, and he was also in the position of having got in the first mortgage which McIntyre had given to the British and Australasian Trust and Loan Co. He had not, in fact, taken the other steps of having his acquisition of the first mortgage registered at the Titles Office, so as to

(*o*) [1873] L.R. 8 Ch. 663.
(*p*) [1847] 9 Q.B.D. 609; 16 L.J. Q.B. 120.
(*q*) [1878] 4 V.L.R. (Eq.) 148.
(*r*) [1893] 19 V.L.R. 161.

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show that first encumbrance upon the certificate of title as the plaintiff's mortgage. The absence of such registration of the transfer of the first mortgage to the plaintiff is not, I think, necessary to be considered in the view I take, and I express no decided opinion about this. The mere registration of the transfer itself does not in my opinion (which I give very doubtfully for the moment) give to the plaintiff that which under the *Transfer of Land Act* would be the equivalent of the legal estate. I am inclined to think that the objection taken—that the plaintiff is a second mortgagee, who has got in the first mortgage and has had the first mortgage transferred to him, who has registered the transfer but has not gone the statutory length of having that encumbrance shown as an encumbrance in his favour on the certificate—is a good one. I doubt very much that he has yet placed himself in the position of being able to bring an action for ejectment as such first mortgagee. He clearly has not all the rights which registration of the mortgage would give. Unless that comparatively formal step is taken by him it may well be doubted whether he can sue as plaintiff in an action of ejectment. But I do not decide this case upon that point. Apart from that position, the plaintiff has shown himself to be possessed of all the right to this land which is ordinarily denominated, for convenience sake, "the paper title." He has shown that everything has come to him, or devolved upon him, which makes that estate his in contemplation of law, as judged by the light of conveyancing, except, if that be needed, the fact that upon the back of the certificate of title he is not shown to be the first encumbrancer, and therefore is not the person to whom the Statute gives the rights ordinarily incident to the legal estate which are mentioned in the section. I think he also gave all the notices necessary in cases of this kind to entitle, and enable, him to sue upon that paper title. I do not think there was any such tenancy, if any, existing as demanded more than a demand of possession; and I think Mrs. Scott got that; and, consequently, I think plaintiff's *primâ facie* position would be complete if the formal defect with regard to registration be not an impediment to it.

Then comes a question on the part of the defendant which

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raises many difficulties. She says that ever since 1875 or 1876 she has been in possession of the block in question here, which is known as allotment 21, parish of Carchap. She says her mother before her "took it up" under the *Land Act*; that is an indefinite statement, but one popularly well understood as that she "selected it." And it is shown by the Crown grant, which later on was issued to her mother, that that is the proper and correct view of the state of things, because the grant subsequently issued purports to be issued in pursuance of the *Land Act* 1869. Therefore the evidence, though slight as to the question, is clear enough that it was a selection under the *Land Act* 1869, which eventuated in the Crown grant of 1885 to her mother. Mrs. Scott's mother was, for some reason not explained, going to a selection at Victoria Valley, and she left the place shortly before 1875 or 1876. She told Mrs. Scott something, which cannot be stated in evidence, but having been told that, Mrs. Scott entered into possession of allotment 21 of Carchap in 1875 or 1876, and has remained there until the present time. I assume against her that it was in 1878—the latest date in favour of the plaintiff. The particulars also given in this action on behalf of the defendant as to when her possession began fix that possession as beginning in 1878. Therefore I am bound to take that date in this action as the earliest point at which it can be said that her possession began. As a matter of fact, I am quite satisfied that apart from the question whether or no actual possession by a person being a licensee of an allotment of Crown land under the *Land Act* 1869 can run as adverse as against those who subsequently acquire the fruition of title of which the licence under the *Land Act* is the seed, apart from that question, I should be quite satisfied that the possession which is in fact shown by Mrs. Scott is such as would amount to what is still called "adverse possession," meaning actual possession within the meaning of the *Real Property Act*. She went into possession in 1876. Before that there was a house upon this land which had been built by her husband. That particular fact I do not look to, but later on, after 1876 or 1878—some considerable time afterwards—that house was pulled down, and another was built by her husband

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in which she and her husband lived ever afterwards. Originally that land was fenced in with a brush fence. That fence was afterwards replaced, there being substituted for it by her husband, for her, a fence of posts and wire. All the enjoyment which could be derived from the land has been hers from the day she entered to the present time. She has never paid rent to anybody. That I think is so emphatic an occupation and possession that it would be extremely difficult to displace it. She has been there over 25 years (if you take 1878 as the date she entered), or 27 years (if you take 1876) without interruption —doing the things which an owner would do; expending her own money as an owner would do; and cultivating it as an owner would do. It would be a very strong view to say it is not actual possession by her within the rule adopted by the Courts. She is dealing with the land similarly up to the present time.

On the other hand, it is argued that she has never protested to anybody that the land was hers. She has met smiles by smiles. Never once until recently has she said "This land is mine." At the utmost, that means that never, until recently, has she challenged the right of any other person to question her possession. It is perfectly clear that she has not, but I think that is precisely what anybody in her position would do. The last thing you would expect of a person under these circumstances would be defiance to the person who could turn her out next day. She would diplomatize, and hold on to her possession by every means she could. Therefore the absence of any protest on her part cannot be used as an argument against her.

Then it is said that McIntyre paid the municipal rates and the water rates. Of course, if McIntyre anticipated a difficulty in dispossessing her, he naturally would pay the rates, and he might do that quite unknown to her. He might procure himself to be rated. Municipal councils do not care who pays the rate, so long as it is paid. Every man who is willing to pay rates is a perfectly welcome subject with them. Therefore from that class of act a very slight inference on the question of actual possession can be drawn. A person in adverse possession who actually pays rates is in a very different case, because a person who holds

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possession as a tenant of the true owner when asked for rates would naturally say "You had better ask the owner." But when she wants the world to understand that she claims the land herself she naturally would pay the rates herself, and there would be a strong inference in her favour. But the fact that the true owner pays the rates affords a very slight inference in his favour that the person in possession is not holding for herself. If she is there as the servant or tenant of the true owner you may be perfectly sure that she would not pay the rates.

Then the next question is that she has said here, and elsewhere, that McIntyre was her "trustee." It is said that that was therefore an acknowledgment by her of McIntyre's title to that land, and that she was there, not for herself, but as *cestui que trust* to McIntyre. But there is no vestige of evidence to sustain any contention of that kind. She has said he was her "trustee," but rather as blaming him for having wrongfully raised money upon land which was hers. I do not think she knows what she means by saying he was her trustee. She explains it by saying—"He was administrator of my father's estate. We all agreed that he should manage the estate." But allotment 21 was none of her father's estate. Then again she says there was some interchange of allotments between herself and her sisters. But she does not in the least degree suggest how McIntyre was her trustee. McIntyre does not say how he was her trustee, and that mere bald assertion that he was her trustee means very little, seemingly, to her, and nothing to me. Certainly it does not show anything which could prevent her from trying as soon as she could to complete the fifteen years that would give her the land.

The next case that is put is this: In 1885 Helen McIntyre obtained the Crown grant, which is in evidence, of this land, allotment 21. Mrs. Scott had been in possession from 1876 up to 1885, when that Crown grant issued to her mother. Her mother transferred that Crown grant to McIntyre. After McIntyre obtained that Crown grant he wrote to Mr. Scott, who was all these years the defendant's amanuensis. McIntyre

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suggested to him that he (Scott) should rent the property from him (McIntyre), and suggested a rent. That correspondence was all of a like kind. Scott replied—"The rent you are asking is a great deal too much," and the correspondence did not eventuate in a tenancy. Finally a letter was written by McIntyre, in which he said—"I want to give you another chance." The reply to that letter was—"If I were disposed to accept a tenancy from you at all, I should want to know what term you would allow me. You can let it to any of the three people you think you can." That in itself was no recognition of McIntyre's right. The whole thing was mere bargaining which eventuated in no recognition. It is entirely conditional upon their coming to an agreement, and they never did come to any agreement, and the mere fact that Scott said "Let it to these people if you can" may well have arisen from the fact that they knew that no one in his senses would take it at the rent, and therefore they said "Go on trying." But I do not think that that correspondence amounts to anything, because in the *Real Property Act* itself, it must be remembered, sec. 27 expressly declares that a mere reiterated claim of right shall not preserve any right of making an entry or distress or of bringing an action without dispossessing the person actually in possession—mere words of threat, much less of mere bargaining, therefore, do not amount to a disturbance of possession. It might be supposed that if the true owner kept on asserting a right to possession that his possession would override her possession. But the Statute provides that that shall not be so; that if he wants to disturb her possession he must either evict her or put her out by process of law. If that were not so, all the owner need ever do would be to stand outside the land and write letters till he filled the house. In view of that provision of the Statute, one sees how very definite any correspondence which embodies these claims must be, and how very definite the position between the parties must become. I think that this correspondence, inasmuch as it led to no tenancy in fact, amounted to nothing as dispossessing Mrs. Scott.

Then it is said that the defendant offered to buy this land from McIntyre. She denies having done so. McIntyre says

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she did, but that he did not accept her offer. But I think the mere fact that she chooses to say to him "I will give you so much for the land," which offer he does not accept, does not amount to such an interference with the possession as would prevent the Statute from running against him. Then come two documents which in one aspect would be extremely important; in the other aspect are of no importance at all. Mrs. Scott is entitled to count her possession from 1878, according to the particulars, or from 1876, according to the actual evidence—I will say from 1878, the date fixed by her particulars—if I may assume that her possession was running from that time onwards, then of course her title to this land became complete in 1893. Fifteen years from 1878 would be complete on the 31st December 1893. I say the 31st December, because there is no date in 1878 fixed by the evidence as that on which she went into possession; therefore I think the latest date in 1893 must be presumed against her.

In 1899 Mrs. Scott executed and delivered two documents, both, I think, on the 14th July 1899. They were such that if her period of 15 years was then still running and not yet complete, they would be, in my opinion, quite sufficient to swamp all her other acts of possession. The one was a notice to the mortgagee that she had purchased the equity of redemption of the mortgagor—the interest of McIntyre—that she desired to tell the mortgagee of that fact, and that she intended to look to him for the whole of the accounts that he might be liable to give. The other is a deed in which she recites that she was holding from McIntyre, and that for the sum of £800 she had purchased from him the equity of redemption in this mortgage which he had given to the British Loan Company. The meaning of that is this, that at that date she said to the mortgagee, "I recognize you as the owner," and although it is possible to say that if somebody else, other than the person in actual possession, had so given the documents that he or she was merely trying to buy in all possible adverse claims, when it comes from the person in actual possession of the property I think it would be fairly strong evidence that she knew that she was not able to hold it in

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her own right. I think the effect of these documents would be to so colour all these acts upon which she relies that it would defeat them all in 1899.

But in the view put before me by counsel it is said that her title by possession was complete in 1893, and therefore it did not matter what she did in 1899. If that be so, and in my opinion it is a true contention, these documents, which would be very strong if they had been executed while the title was still incomplete, become unimportant, because the title had been then divested in her favour. What she chooses to say then does not matter a snap—the thing had been finished and complete.

On the other hand, it is said for the plaintiff that her true adverse possession—the only possible legal adverse possession on which she can claim—did not under the circumstances begin till 1885, when the Crown grant issued to Mrs. McIntyre; that up to then the land was land of the Crown; that time does not run against the Crown, and therefore the defendant could not be regarded as having anything which the law could regard as adverse possession till 1885. Counsel for the plaintiff says if you regard that as the time at which her possession began these two documents come in, and therefore they have all the force which it appears to me they would have if they in fact were executed while her 15 years' possession was still running. If 1885 be the true starting point, I think her possession would have been broken in such a way as to disentitle her to set up the defence of adverse possession. I have therefore to investigate that proposition.

For a long time it seemed to me that it was a very complete answer, because the principle of law is undoubtedly so—that time does not run against the Crown. The Crown is the original owner of all land in this country. I need not trouble about the doctrine that the Crown is the lord paramount of all titles to land. It is a survival, or consequence, of the feudal system, and in this country the Crown is generally the owner of all lands. Then it has been contended that, that being so, the Crown grant is a clean grant from the Crown, and therefore it must be assumed under that grant that until the Crown grant

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issued to Helen McIntyre there was no right in anybody to put a blot upon it. Therefore, the previous history of the land is not open to anybody; and therefore it must be assumed that until then the land was the Crown's; that time could not run against it; that though defendant was in possession that could not have any effect as against the Crown, and that it was only after the day of the Crown grant that any possession of hers could begin to affect it. Against that view it is said—"That is very true as far as it goes; but this Crown grant, on its face, shows, amongst other things, that it is issued in pursuance of the *Land Act* 1869." That being so, counsel for defendant has argued that the Court is bound to assume this—that as the Crown cannot issue Crown grants except in pursuance of one or other of the provisions of the *Land Act* and certain other Acts, and that as this Crown grant states that it is issued in pursuance of the *Land Act* 1869, that carries with it the necessary assumption that it must have been preceded by at least three years' occupancy by Helen McIntyre, under the license from the Crown issued under the *Land Act* 1869. Then it is said—"It is admitted that there might very well have been a lease succeeding the license which itself was followed by a lapse of time, but there is no evidence of that." Although that be so it is insisted by counsel that the very shortest time it could have been in the possession of the licensee prior to 1885 was three years, because sec. 20, sub-sec. 5, offers two alternatives. After three years' occupation under the license and performance of its conditions the licensee has power to pay up the whole difference between the amount already paid and 1*l.*, and thereupon may demand a Crown grant; or he might have taken instead a lease for the remaining term of seven years, at a yearly rent of two shillings an acre, so that the balance would be made up in the name of rent. Therefore it is said that as the position was that the licensee might at once on the expiration of his license have paid the fourteen shillings an acre and taken out a Crown grant, it must be assumed that at least three years had elapsed under the license before the Crown grant could have issued to Helen McIntyre. Then, the facts material to the proposition being ascertained in that way, it is said by Mr. Pigott that, although

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this much may be assumed, it cannot help the defendant, because until the Crown grant issues nobody can have such a possession which would take away the right of possession from the Crown, and that even the licensee himself is in that position. He cannot assign; he cannot by letting another into possession of the land interfere with the title of the Crown to the land, and make his own license voidable by having done so. Therefore the old position still remains—that the only point from which the passage of time can be reckoned is 1885, when the Crown grant was issued.

Now it appears that that proposition, that time cannot run against the Crown, is not quite so rigid as has been assumed in argument. The case of *Attorney-General* v. *Bristowe* (s) shows that time may run against the Crown, and that, because of adverse possession for 60 years, it was held to bar the rights of the Crown in the island of Tobago. That looks as if the Court was then viewing the matter as to the general position of law, though it is possible it was only regarding the case as one of presumption. In the case of *Doe* d. *William IV.* v. *Roberts* (t) it was held that under the Statute of William IV. the Crown might be barred by a series of acts which were not mere acts of trespass. Therefore the position so far as the Crown is concerned is not quite so certain as has been assumed during argument.

But I think the true answer has been made. This is an action of ejectment. A man with no title at all, who is in, may turn out a person later in possession than himself who has no title at all. Counsel says this is a peculiar action in which a plaintiff is bound to succeed, not on the title of anybody else, but by force of a title of his own. Whoever assumes the attitude of plaintiff in this action must succeed by the strength of his own title. That is undoubted. Therefore under that proposition a man who never had a vestige of title, and had been in possession, and had been dispossessed by another who came in later, may still say to the person who dispossesses him, "As against you my title is good enough; against me you are a mere wrongdoer." That has been done before, and is a perfectly true proposition of

(s) [1880] 6 App. Cas. 143. (t) [1844] 13 M. & W. 520.

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law, for possession is *primâ facie* evidence of a seisin in fee. As against that, a person who has been assumed to have a title, in which title there is some defect from want of proof, although there is no doubt that he is the person who ought to have the paper title, cannot turn out a person with no title, because he shows that that other who is out of possession has no effective title. That therefore shows that it is quite unnecessary to support a plaintiff in an action of ejectment that he shall have himself a good or any title, except that by possession; it shows also that the principle is that he must, and may, succeed on the strength of his own title, if it is a good title for the day.

From this assumption counsel works the proposition out on these lines. Let it be assumed that defendant's possession continued during the shortest possible time that her mother could have been entitled as licensee, she would have been in for three years prior to the Crown grant. During the whole of that time the mother as licensee had a perfect right to turn out anyone else who came into possession of the same property. She had no right at all to assign her possession, but if anyone else came in she had a right to turn that person out. He then says defendant had come in. Mrs. McIntyre did not, although she might have done so, turn her out. That, therefore, he says, is the test, no matter what the Crown might have done. Here was a person from the seed of whose license the subsequent Crown grant was the fruition. That person could have turned out defendant and did not do so; and, therefore, as against her, and those claiming through her, defendant is entitled to say—"I was in possession at a time when you could have turned me out and did not. It is no answer to me to say that the *Land Act* gives the Crown the power to treat any promise to allow any person to have possession of that land as a breach of the conditions of the license, that the Crown has a right not only to turn out any person who does enter, but to turn out also a person who is acquiescing." That is a power the Crown might exercise under the *Land Act*, but did not in this case. So far from doing so, the Crown issued a paper title in the shape of a Crown grant to the mother, the licensee, and

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therefore the defendant is entitled to say—"The licensee had all along the right to turn me out, and later McIntyre acquired a right to turn me out. He did not do it; the final result was that in 1893 my right to the fee simple by reason of 15 years' possession duly accrued." And that though the Crown might have the right to make an end of both the licensee and the defendant. The question between the parties here is—"What is *your* right to turn me out? You might have exercised such a right 15 years anterior to 1893; you did not do so." I think that contention is right. The principle involved in *Osborne* v. *Morgan* (*u*) seems also to support it. This action of ejectment is quite *sui generis*. It is not like any other class of case. It might very well be that another person could set up the rights of the Crown in some other form of action, but the plaintiff cannot, I think, in this one.

Reference has been made to the case of *Vinnicombe* v. *McGregor* (*v*); and I thought for a time that the proposition necessarily involved in the judgment of Hodges, J., in that case might have been such a one as to affect this case But in the view I take I do not think that it does. In that case the question was whether a Crown licensee in possession could by consenting give a right to an adjoining owner by some work done on his own land to throw water perpetually over the land so held by such licensee. I am still of opinion that in view of the *Land Act* 1869 that is legally quite impossible. The judgment of Hodges, J., is to the contrary, and if it be correct it strengthens the position of the defendant in this case. He considers that a licence under the *Land Act* 1869 because it is intended to ultimately culminate in a Crown Grant may be regarded not as a mere licence in the ordinary sense, but as an inchoate fee simple—to use his own words; and so far as it goes that would help the defendant here. I think it may be so regarded so far as the action for ejectment is concerned, for the reasons already mentioned, but not in any other action.

There was another authority cited which I refer to for the sake of completeness: *Reg.* v. *Board of Land and*

(*u*) [1888] 13 App. Cas. 227. (*v*) 29 V.L.R. 32.

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Works, Ex parte Jacomb (*w*). In that case the Full Court decided, that, notwithstanding the regulations of the Board of Land and Works prohibiting the assignment of an interest in a lease, the assignee in insolvency did take by operation of law, against the will of the lessee, after the lessee had occupied three years under the lease under the *Land Act* 1869. That question has not troubled us here because there was no evidence that any lease ever did issue. But counsel was able to fall back upon the assumption that there must have been at all events a licence in existence for three years prior to the issue of the Crown grant in 1885. For these reasons I think the defendant is entitled to my judgment as having established that possession which was necessary to defeat the plaintiff's claim. Judgment for defendant, with costs to be taxed. Order under Order LVIII., r. 1* (*a*), that notice of appeal may be served within 28 days.

J. M.

From this judgment the plaintiff appealed to the Full Court.

Pigott and *Cussen* for the appellant.

Mitchell and *Davis* for the respondent.

In addition to the authorities cited in the Court below the following were referred to: — *Attorney-General* v. *Goldsbrough* (*x*); *Munro* v. *Sutherland* (*y*); *Furedon* v. *Clogg* (*z*); *Incorporated Society, etc.* v. *Richards* (*a*); *Dublin Corporation* v. *Judge* (*b*); *In re Winter* (*c*); *Doe* v. *Terry* (*d*); *Attorney-General* v. *Brown* (*e*); *Walter* v. *Yalden* (*f*); *Commercial Bank* v. *McCaskill* (*g*); *Sandhurst Building Society* v. *Gissing* (*h*); *James* v. *Salter* (*i*); *In re Thackwray & Young's*

(*w*) [1869] 6 W.W. & A'B. (L.) 38.
(*x*) [1889] 15 V.L.R. 638; 11 A.L.T. 149.
(*y*) [1874] 5 A.J.R. 139.
(*z*) [1842] 10 M. & W. 572.
(*a*) [1841] 1 Dr. & W. 258.
(*b*) [1847] 11 Ir. L.R. 8.
(*c*) [1893] 14 N.S.W. L.R. (L.) 389.
(*d*) [1849] 2 N.S.W. S.C.R. (Appx.) 1.
(*e*) [1847] 2 N.S.W. S.C.R. (Appx.) 30.
(*f*) [1902] 2 K.B. 304.
(*g*) [1897] 23 V.L.R. 343; 19 A.L.T. 102.
(*h*) [1889] 15 V.L.R. 329; 11 A.L.T. 62.
(*i*) [1836] 2 Bing. N.C. 505.

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Contract (*k*); *Sands* v. *Thompson* (*l*); *Warren* v. *Murray* (*m*); *Drummond* v. *Sant* (*n*); *Burroughs* v. *McCreight* (*o*); *Soar* v. *Ashwell* (*p*); *Rouchefoucauld* v. *Boustead* (*q*); *Pugh* v. *Heath and others* (*r*); *Wrixon* v. *Vize* (*s*); *Attorney-General* v. *Hustlers Consols, etc., Co.* (*t*); *Thornton* v. *France* (*u*); *Ley* v. *Peter* (*v*); *Sanders* v. *Sanders* (*w*); *Bethune* v. *Porteous* (*x*); *Doe* v. *Edmonds* (*y*); *Dryden* v. *Dryden* (*z*); *Attorney-General* v. *Love* (*a*); *Attorney-General* v. *Bristowe* (*b*); *Lambert* v. *Taylor* (*c*); *Robbins on Mortgages*, p. 734; *Derby and Bosanquet on the Statute of Limitations* (2nd ed.), p. 517; *Carson's Real Property Statutes*, p. 163; *Smith's Leading Cases* (11th ed.), vol. ii., pp. 660, 700, *sqq.*; *Lewin on Trusts* (10 ed.), p. 1075.

Cur. adv. vult.

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A'BECKETT, J., read the following judgment:—This is an appeal from a judgment of the learned Chief Justice, in favour of the defendant, Mary Johnson Scott, in an action to recover land. He held that she had been in possession since 1876, under such circumstances as to acquire title under the *Statute of Limitations*. As to the character of her possession, as a matter of fact I accept the conclusions of the judgment based upon distinct acts of ownership, such as building, fencing, and cultivating. The appellant has scarcely assailed these conclusions, but has relied on other matters to show that time could not run in her favour until 1885, when the Crown grant issued to the defendant's mother, who transferred to the defendant's brother, McIntyre, in the same year. The plaintiff claims through McIntyre. The Crown grant purports to have been issued under the *Land Act* 1869, and although the licence and the lease which preceded it are not in evidence, I think we are

(*k*) [1888] 40 Ch.D. 34.
(*l*) [1883] 22 Ch. D. 614.
(*m*) [1894] 2 Q.B. 648.
(*n*) [1871] L.R. 6 Q.B. 673.
(*o*) [1842] 1 Jo. & Lat. 290.
(*p*) [1893] 2 Q.B. 390.
(*q*) [1897] 1 Ch. 196.
(*r*) [1882] 7 App. Cas. 235.
(*s*) [1842] 4 Ir. Eq. Rep. 463.
(*t*) [1872] 3 V.R. (Eq.) 121.
(*u*) [1897] 2 Q.B. 143.
(*v*) [1858] 3 H. & N. 101.
(*w*) [1881] 19 Ch. D. 373.
(*x*) 19 V.L.R. 161.
(*y*) [1840] 6 M. & W. 295.
(*z*) 4 V.L.R. (Eq.) 148.
(*a*) [1898] A.C. 679.
(*b*) [1880] 6 App. Cas. 143.
(*c*) [1825] 4 B. & C. 138.

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justified in coming to the conclusion which the learned Chief Justice arrived at, that the grant in 1885 was the ultimate acquisition of complete title from the Crown by the person who had acquired prior rights by licence and lease under the *Land Act* 1869, enabling her to acquire the fee on the performance of her obligations under them.

Treating this as sufficiently shown by the evidence, the appellant meets it by saying that the legal fee under the grant being undoubtedly a new estate, and the action being brought to recover the land under this new title, the *Statute of Limitations* had no operation until the grant issued. Sec. 18 of the *Real Property Act* 1890 says :—"No person shall bring an action within fifteen years next after the time at which the right to bring such action shall have first accrued." It is contended that, as the right to bring an action by the owner in fee never arose till the grant issued, the fifteen years did not begin to run until its issue, and that within fifteen years there was an acknowledgment under the Statute. It is said that although the person who afterwards became proprietor in fee could have brought an action to recover the land, first as licensee and afterwards as lessee, the action which she could have brought would not have been "such action" within the words of the section so as to preclude the right to bring the present action.

This contention would, I think, be correct if there had been no connection between the rights under the grant and those under the licence and lease, but the question is whether there has not been such a continuity of interest in the land as to impose the duty of dispossessing the trespasser so as to prevent the Statute running, on the first acquisition of an interest from the Crown which would have enabled the lawful occupant to dispossess the intruder.

We have to say, in the case before us, when the right to bring such action first accrued within the meaning of sec. 18. No other section of the *Real Property Act* supplies an answer. There does not appear to have been any dispossession, or discontinuance of possession, under sec. 19, and that section is not exhaustive. No other section fits the present case, and we have to look at sec. 18, and the general scope of the Act, and at

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decisions under it, to determine the novel point before us. Stated generally, the policy of the Act was to require a person having a right to land to exercise it as against a person illegally occupying at the peril of losing the land if the illegal occupation continued undisturbed for fifteen years. Here we have an occupation such as the Statute contemplated continuing undisturbed, and when it commenced, and up to the time of the issue of the grant, a person having legal title from the Crown who could have recovered the land against the occupant. It cannot be suggested that a Crown licensee or lessee, such as in this case, could not eject a trespasser by legal process. This inactive licensee and lessee afterwards acquired a legal estate in the fee, not by virtue of any new right unconnected with her prior interest, but by the maturing of a right which had its inception in the licence. No doubt, up to the issue of the grant, there was no certainty that the fee would be acquired; the right to the land was inchoate, and might have been lost, but it was in fact perfected, and we have to say whether the nature of this new title is such as to wipe out all the consequences of past inaction, and to give a new term of fifteen years within which inaction must continue before the illegal occupant could acquire title. I can find no rule laid down to determine what differences in estate will or will not give a new start, so to speak, to the *Statute of Limitations*, but I should say that since the *Judicature Act*, if not before, the mere difference between legal and equitable estates would be insufficient. Take the case of omission to proceed against an illegal occupant by a purchaser under a contract of sale, or by the owner of land subject to mortgage, or to an outstanding term, there is no reason for saying that a conveyance by the vendor, a re-conveyance to the owner, or the getting in or expiration of the term, would give this new start in the owner's favour. One authority—*Pugh* v. *Heath* (*d*)—may be said to favour a contrary view. There a mortgagee having the legal estate was held to have acquired a new right, such as we are considering, by a foreclosure decree. The facts of that case are peculiar, and it is distinguishable in this respect—that until foreclosure, though a right to recover at

(*d*) 7 App. Cas. 235.

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law might have existed, it would have been subject to the equities of the person in occupation under the mortgage, and its exercise could have been restrained by proceedings in equity until the foreclosure decree had put an end to these equities. The changes in the legal interest of the person who might have brought the action against the defendant in the present case made no changes in her rights as against the defendant; the right to turn her out was as good in the licensee as in the grantee. On the whole, I agree with the view of the Chief Justice that time ran in favour of the defendant from the time at which she entered into possession, and not from the date of the Crown grant, and, therefore, that her title had matured long before 1899, in which year she executed certain documents, which were relied upon as acknowledgments under the Statute, entitling the plaintiff to sue notwithstanding the defendant's long possession.

The view I take makes these documents unimportant as acknowledgments, but one of them requires consideration in other respects. I refer to the deed of June 1899 between McIntyre, the transferee from the Crown grantee, and the defendant. It opens with the following recital:—"Whereas allotment 21 of the parish of Carchap (the subject of this action) was some years since transferred to McIntyre as a trustee for Mary Johnston Scott (the defendant), but no deed of trust with reference to the same was executed, as the parties hereto severally admit, and that McIntyre, being owner of various other lands, mortgaged allotment 21 with these various other lands to secure moneys advanced to him by the British and Australasian Trust and Loan Company. That he afterwards gave a second mortgage over all these lands to the present plaintiff. That the defendant is now and has been for many years residing on allotment 21, and hath requested McIntyre to execute and carry into effect the trust upon which the allotment was transferred to him, and he, being unable to do so, hath agreed to assign to the defendant his interest in the moneys to be produced by sale of the lands included in the said mortgages, so that the same may be a security to her to the extent of 800*l.*, the estimated value of such allotment." The deed

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then assigns to the defendant McIntyre's equity of redemption in all the lands, and the moneys to arise from the sale of them "to the end, intent, and purposes that, after the claims of the mortgagors shall be paid and satisfied, the said lands and moneys to arise from the sale of them shall stand and be security to (the defendant) for a sum of 800*l.*, and all moneys she may expend and all expenses she may incur in entering into the agreement entered into as aforesaid, and in obtaining payment of the said sum of 800*l.* or any part thereof, or in any way incidental thereto, it being the object of the said McIntyre that (the defendant) shall receive the said sum of 800*l.* free from all deductions." The defendant, by the same deed, agrees that, "if McIntyre transfers to her allotment 21 free from encumbrances, she will release him from all claims in respect of the money intended to be secured, and that, as to the sum of 800*l.*, she will not in any event seek to obtain payment out of any other fund belonging to McIntyre."

In July 1899 the defendant gave notice of this deed to the company and to the plaintiff. It is contended on the part of the plaintiff that its reference to the trust upon which allotment 21 was transferred, and to other matters therein stated, is evidence to show that no title could have been gained by adverse possession against McIntyre, as the defendant was merely occupying as *cestui que trust* by the leave of McIntyre and consistently with the relation of trustee and *cestui que trust* subsisting between them. That McIntyre was such a trustee as is contemplated by sec. 23 of the Statute, and that the defendant held as his *cestui que trust.* Certain cases in which the trust had not been expressly declared, but was clearly to be implied from the relations of the parties, have been held to be within the section, but the circumstances were very different from those of the present case. I agree with the view of the Chief Justice that there was no recognition of any fiduciary relation between McIntyre and the defendant; that they were in fact claiming and holding independent and adverse interests, not one for or under the other; and that whatever the equities may have been, there was no such ascertained position as to bring the case within the rule as to a *cestui que trust* in possession of land held

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by a trustee for her. The words trust and trustee appear, as the Chief Justice observes, to have been used by the parties without any definite meaning being attached to them, and without any facts apparent which would have led a lawyer by implication to fasten a clear trust upon anyone. The case seems to have been one common in the Court's experience, where different members of a family have taken up land and improved and paid for it by joint contributions, without arriving at any clear understanding of what their rights should be as to the different lands acquired. The deed of June 1899 between the defendant and McIntyre appears to have been the adjustment of a difference arising as to allotment 21, but, taken with the rest of the evidence, it does not support the view that during her long preceding years of possession she should be regarded as having held with the permission of McIntyre as her trustee. But the deed presents another view not set up by pleading, and scarcely raised in argument, that, by virtue of its provisions, the defendant made over all her interest in allotment 21 conditionally on receiving 800*l.* She obtained as consideration an interest in other lands to which she had no prior right, and it is clear that, if she got 800*l.* as the deed contemplated out of other lands, or by payment from McIntyre, she would have no right to allotment 21. It might be questioned whether the effect of the deed was not to abandon any right to allotment 21 in consideration of acquiring other rights. We do not know what benefit she got from the deed—probably none, or reference would have been made to it—and we are not in a position to say that the deed, *per se*, as a document in evidence entitles the plaintiff on the present pleadings to judgment in his favour. I think all that we can now do with reference to it is to declare that our judgment for the defendant is without prejudice to any right which the plaintiff may have under the deed. This would preserve to him the right of recovering the land if moneys have been paid, or should hereafter be paid, which would provide the 800*l.* and expenses which the defendant agreed to accept as a discharge of all claims to the land. We add words "without prejudice" as above stated, and dismiss the appeal, with costs.

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HODGES, J. My brother Hood and I agree with the first part of the judgment that has been delivered by our brother A'Beckett, and are therefore of opinion that the person with the paper title has been out of possession, and a person without the paper title in possession for much more than the statutory period, and that therefore, *primâ facie*, the statutory period has run, and the defendant is entitled to retain possession. But the plaintiff contends:—(1) That his predecessor in title—McIntyre—and the defendant held, with regard to each other, the position of trustee and *cestui que trust* respectively; and (2) that the defendant was consequently tenant-at-will to McIntyre; (3) and that that tenancy has been determined within the fifteen years; and (4) that sec. 23 of Act No. 1136 has no application, by reason of the last clause of that section. We think that the plaintiff has established the first of the above propositions.

For, while no evidence is given of the origin or creation of the trust, or of its terms or of the duties of the trustee, still McIntyre and the defendant have both joined in a deed, executed in the presence of a solicitor, which recites that the land in question "was some years since transferred to McIntyre as trustee for Mary Johnson Scott, but no deed with reference to the same was executed." When that statement is set up in evidence against Mary Johnston Scott, we feel it impossible to ignore it; it seems to us very strong evidence against her that the relation of trustee and *cestui que trust* existed between McIntyre and her, and we should so find. This brings us to the second proposition, "that the defendant was consequently tenant-at-will to McIntyre." It may be quite true in the case of a simple trust, where it is proved that the *cestui que trust* has been let into possession by the trustee, or that the *cestui que trust* is in possession with the consent of the trustee, and there is no other evidence of the terms of the holding; that the proper inference to draw from these facts is that the *cestui que trust* is tenant-at-will to the trustees: *Melling* v. *Leak* (*e*). But in the case under consideration we do not know whether this is or is not a simple trust, nor what other persons if any are interested in the trust, nor what the terms of the trust are.

(*e*) [1855] 16 C.B. 652.

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And that it was not a simple trust, and that this land was not held by the trustee solely for defendant seems plain, since McIntyre in October 1886 offered to let this land to defendant through her husband, and defendant's husband, as defendant's amanuensis, writes:—

"Clear Lake,
Oct. 11, 1886.

"Mr. M. C. McIntyre.

"SIR,—I am in receipt of a note from you *re* letting a block of land in this neighbourhood. I am anxious enough to hold the land, but would not give that rental for the best land in this district, but had I been ever so inclined to give the rent you ask, I should have liked to know for what number of years. Therefore, you may let any of your three offerors have the land at the 50*l*.

"W. SCOTT."

If it were a simple trust, the defendant was entitled to the land, and to have it transferred to her, and if "anxious to hold the land" could have held it. This evidence is utterly inconsistent with the trust being what is known as a simple trust. Further, this case furnishes a very good illustration that the mere fact that the relation of trustee and *cestui que trust* exists between the person with the legal title and the occupier is by no means conclusive that the latter is tenant-at-will to the former. If defendant had accepted McIntyre's offer she would have been a yearly tenant. We can find no facts which would justify the conclusion that the defendant was tenant-at-will to McIntyre, and are therefore of opinion that the appeal should be dismissed, with costs. We concur in the preservation of any right the plaintiff may have under or by virtue of the deed.

Solicitor for plaintiff (appellant): *E. Hart* (for *L. Horwitz*, Hamilton).

Solicitors for defendant (respondent): *Hill & Talbot* (for *Palmer & Son*, Hamilton).

J. M.

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[IN CHAMBERS.]

HOLROYD, J.

1904
April 22.

PRICE *v.* PRICE *and Another.*

Costs—Receiver, costs of fixing remuneration of—Costs "properly incurred."

In a partnership action in which a receiver had been appointed an order was made allowing the receiver all his costs "properly incurred," including the costs of settling his remuneration. The amount of the remuneration was fixed by the Chief Clerk after a prolonged hearing. Upon the taxation of the receiver's bill of costs the taxing officer allowed costs upon the scale between party and party only.

Held, upon a review of taxation, that under the order the receiver was not restricted to costs as between party and party, but was entitled to all costs *properly* incurred.

SUMMONS TO REVIEW TAXATION.

The application was made on behalf of R. H. Butler, who was the receiver and manager appointed by the Court in a partnership action between Evan Price and Alfred W. D. Price and another. A judgment having been given by consent in the partnership action, and the matter coming on for further consideration before Holroyd, J., an order was made discharging Butler from his office as receiver and manager, and it was ordered that the remuneration of Butler, when fixed, should be paid to him by the plaintiff and the two defendants in equal third shares; "and, further, that it be referred to the taxing officer of this Court to tax the costs of the plaintiff and the defendants in this action, including the costs of this application and the costs of settling the remuneration, and of the taxation hereby directed, and the costs of the receiver and manager properly incurred by him as such, and that such costs when taxed be paid by the plaintiff and defendants in equal third shares." The receiver was served with notice to attend before the Chief Clerk for the purpose of settling the remuneration, and the amount of such remuneration was the subject of a long inquiry before the Chief Clerk, who ultimately awarded to Butler an amount far in excess of what the parties to the action contended he was entitled to. Upon the taxation of the bill of costs delivered by Butler, the taxing officer disallowed a number of items, and gave the following reasons for overruling the objections:—"All the objections relate to the basis of taxation.

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From the construction of the order of His Honor Mr. Justice Holroyd, 17th July 1903, it appeared to me that the receiver was entitled to his costs between party and party only, and not as between solicitor and client. Item 31, term fee 15*s.*, was disallowed, as the receiver was not a party to the action. I have been referred to the case of *Wells* v. *Croft* (*a*), but in that instance the receiver was a party to the action. I have therefore disallowed the objection.—P. A. McANULTY, Taxing Officer."

The summons having come on before Hood, J., the objection was taken that under the order the receiver was not entitled to any costs at all as to the settling of his remuneration, and the matter was referred to Holroyd, J., who had made the order.

W. H. Moule in support of the summons—As to the form of the order, it clearly was intended to cover all the costs of the receiver down to and including the actual settlement of his remuneration. The plaintiff and the defendants are directed to pay such costs, and the only costs of any importance would be the receiver's, because the parties would bear their own costs.

[HOLROYD, J. There is no doubt whatever that the order was intended to cover these costs, and in my opinion it clearly does cover them.]

A receiver is entitled to a full indemnity as to costs, and if the costs were taxed as between party and party he would not be indemnified: *Batten* v. *Wedgwood Coal and Iron Co.* (*b*); *In re Wells and Croft* (*c*).

The general rule is that a receiver is entitled to costs as between solicitor and client: *Fitzgerald* v. *Fitzgerald* (*d*). The term of the order is that he should get all costs "*properly* incurred by him," and that clearly means something more than party and party" costs; and if it includes something more it really means costs as between solicitor and client. Some effect must be given to the words "properly incurred." There is no reason why the receiver should be put to heavy expense in obtaining that which the Chief Clerk held he was entitled to.

(*a*) [1895] 72 L.T. 359.
(*b*) [1884] 28 Ch. D. 318.
(*c*) [1895] 72 L.T. 359.
(*d*) [1843] 5 Ir. Eq. 525.

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Schutt for the plaintiff to oppose—Under this order the receiver is only entitled to party and party costs; "solicitor and client" costs can only be recovered where the order expressly provides for them: *Eady* v. *Elsdon* (*e*). The word "properly" is understood in all orders as to costs. All costs which have to be paid by the other side must be costs *properly* incurred.

[HOLROYD, J. No; the phrase is often used in connection with an order as to the costs of a trustee, and certainly includes something more than party and party costs.]

But a trustee's costs stand upon a different footing; the contractual relationship alters the principle.

Starke for the defendants also to oppose—The form of order directing costs as between solicitor and client must be specific. When the receiver comes to fight the question of remuneration he is in the position of a litigant.

[HOLROYD, J. He is entitled to get all his costs of having the remuneration settled, and as between solicitor and client, if the costs have been properly incurred. In my opinion that is the position of a receiver appointed by the Court; the Court will take care to support him, and to see that he is fully indemnified.]

HOLROYD, J. I think this gentleman, as a receiver appointed by the Court, is an officer of the Court, entitled to be reimbursed all his expenses. Notice was given to him to attend an appointment to decide the question of his remuneration. He did attend, and he had to fight both the plaintiff and the defendants, who differed from him as to the amount he was entitled to get. The Chief Clerk refused to agree with the amounts suggested by the plaintiff and the defendants, and fixed the remuneration, which I must take to have been properly and fairly awarded to the receiver; and I cannot see any reason whatever why he should not now get all the costs he properly incurred in obtaining the remuneration which has been judicially awarded him—every penny of such costs. His position is far more that of a trustee than of an ordinary litigant; he can scarcely be called a litigant. In his reasons for disallowing the objections to

(*e*) [1901] 1 K.B. 460.

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his taxation, the taxing officer said that it appeared to him from the order made by me that the receiver was only entitled to costs as between party and party, and not as between solicitor and client. In my opinion that construction of the order is erroneous. I meant in that order exactly what I said. I meant that the receiver was to get all his costs properly incurred, and in my opinion the costs which he incurred in maintaining his title to that which has been judicially held to be due to him come within the term "costs properly incurred," and he would be entitled to deduct them out of the funds before distribution.

I will not allow the item 15*s*. term fee. The summons will be otherwise allowed, and the bill remitted to the taxing officer with this intimation. I allow the plaintiff costs of this application.

Solicitors for receiver: *Blake & Riggall.*
Solicitors for plaintiff: *Braham & Pirani.*
Solicitors for defendants: *Ford & Aspinall.*

W. H. M.

HODGES, J.

1904
April 22.

MEAD *v.* ANDERSON.

Practice—Pleading in an action for libel—Justification—Justifying substance of the libel—Variation between libel and matter pleaded in justification—Particulars—Fair comment.

In an action for libel the article complained of alleged that the plaintiff, while holding the position of *organizing secretary* of a branch of a miners' association applied for the position of clerk to a mine, thus showing himself ready to desert the working miner. The defendant, under a defence of justification, pleaded that the plaintiff while holding the position of *president* of the said branch applied for the clerkship, the duties of which were inconsistent with and opposed to the objects of the association.

On an application to strike out the plea as irrelevant,

Held, that the plea was good, on the ground that the defendant was entitled to rely on the facts therein alleged in proof of the substantial truth of the charge contained in the alleged libel.

The defendant also pleaded that the said association was a public association, and that the words complained of, so far as they consisted of expressions of opinion, were fair comment upon its acts and management, which were matters of public interest, and on the acts and conduct of the plaintiff as an officer of such branch.

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HODGES, J., refused to strike out the plea, but ordered defendant to give particulars of the facts upon which it was alleged that the association was a public association.

Defendant, in justifying another part of the article, pleaded "that the majority of a party" of which plaintiff was a member had complained to the manager of plaintiff's incapacity, and had refused to work with him.

Held, that the defendant should not be ordered to give particulars of the names of the "majority of the party," as he would not be bound to prove their names at the trial.

SUMMONS.

This was an application on behalf of the plaintiff to strike out certain paragraphs of the defence, and for further and better particulars under the defence.

The plaintiff by his writ claimed 1000*l.* damages for a libel alleged to be contained in an article published in the defendant's newspaper.

The material parts of the article complained of were as follows:—

"He [the plaintiff], while holding the position of organizing secretary [of a branch of the Amalgamated Miners' Association], had applied for the clerkship at the Chiltern Valley mine, and shown himself ready to take it, and desert the working man if he succeeded in obtaining it. . . . Instead of the money being devoted to the purposes for which it was exacted, viz., to the accident fund, it has gone in the form of gold chains and medals to the officers."

The plaintiff in his particulars of innuendoes alleged that the words complained of bore (*inter alia*) the following meaning:—"That the plaintiff joined in dishonestly diverting the accident funds of the branch to the purchase of gold chains and medals for himself and others."

The article also alleged that the plaintiff had "heard from the mining superintendent some truths of himself which were incontrovertible, and which placed him in a painfully humiliating position."

By his defence the defendant (*a*) denied the innuendoes; (*b*) alleged that "the words complained of, so for as they are allegations of fact, are, in their proper and ordinary meaning, true in substance and in fact." In the particulars of justification thereunder the defendant alleged [paragraph 4 (vi.)]—"The

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plaintiff in the month of March 1899 held the position of president (and not of organizing secretary, as in the words complained of alleged) of the Chiltern and Indigo Branch of the Amalgamated Miners' Association. Such association was formed and existed for (*inter alia*) the protection and promotion of the interests of the miners, more particularly as opposed to, or where they conflicted with, those of the mine-owners and their representatives.

"The plaintiff, while holding such position, did by letter . . . . apply for the position of clerk at the Chiltern Valley No. 2 mine. The said position of clerk to a mine entailed upon the person holding it the duty (*inter alia*) of protecting the interests of the mine-owners as opposed to or where they came into conflict with those of the working miners and other duties inconsistent with and opposed to the objects of the said association."

The plaintiff, by this summons applied to strike out this paragraph.

The defendant also in his particulars of justification alleged [paragraph 4 (vii.)] that "part of the moneys of the branch have in fact been expended in gold medals and watch chains. The said moneys were not properly applicable to such purposes, but the defendant did not impute any dishonesty to the plaintiff or the officers of the said branch in so dealing with such moneys;" and further alleged that the recipients of the medals, etc., were officers of the branch.

The plaintiff asked to have struck out the words—"but the defendant did not impute any dishonesty to the plaintiff or the officers of the said branch in so dealing with such moneys," on the ground that they "seek to limit the meaning of the words complained of by the defendant's alleged personal intention as to such meaning."

Paragraph 5 of the defence alleged—"The Chiltern and Indigo Branch of the Amalgamated Miners' Association is a public association, and so much of the words complained of as consists of expressions of opinion is fair comment made in good faith and without malice concerning acts of the said branch or association and the management thereof, which were matters of

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public interest, and such parts thereof as refer to the plaintiff are fair comments on his acts and conduct as an officer of such branch. The defendant says that the following matters referred to in the said article were matters of public interest, and that the statements in the said article are fair comments thereon:—

"(1.) The transfer of printing orders from Chiltern to another town and the reasons therefor.

"(2.) The publicity given to any such intended transfer.

"(3.) The relations of officers of the said branch and association with the miners and the mine-owners or their representatives respectively.

"(4.) The application and expenditure of the moneys of the said association."

The plaintiff applied to have this paragraph struck out on the ground that it "raises no reasonable ground of defence, and no facts are alleged to support the general allegations therein contained." Alternatively, the plaintiff asked for an order for "particulars of the facts upon which it is alleged that the said branch is a public association."

Paragraph 4 (v.) of the defence stated that one John Cock said to the plaintiff in the presence of several persons—"You afterwards joined a contract party at the Barambogie mine, and the majority of the party complained to the manager of your incapacity, and refused to work with you," and asserted the truth of Cock's statement.

The plaintiff asked for particulars of the names of the "majority of the party who complained and refused to work with the plaintiff," or, alternatively, to strike out the part of the defence justifying the same.

Isaacs, K.C. (with him *Levinson*), for the plaintiff in support —The article complained of alleges that the plaintiff, while occupying the position of organizing secretary of a branch of the Amalgamated Miners' Association, applied for the position of clerk to a mine. To justify that statement the defendant attempts to set up something quite different—something that is not complained of, and was not contained in the libel.

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He referred to *Odgers on Libel* (3rd ed.), p. 192 *seq.*; *Rassam* v. *Budge* (*a*).

As to paragraph 4 (vii.), the words we ask to have struck out put the defendant's own meaning on them, and attempt to justify them. The authorities are clear that a defendant cannot do this.

[HODGES, J. The plaintiff by his innuendo says that the words do impute dishonesty. Is not this merely a denial of your innuendo?]

If that is so it is unnecessary, for the defendant has, by paragraph 1, denied our innuendoes in general terms. Paragraph 5 might be an admissible plea in England, but it is clearly a bad plea in Victoria, where there is no privilege for fair reports of public proceedings. (He referred to *Gannon* v. *White*.) (*b*) In any event we are entitled to know the facts on which the defendant intends to rely at the trial in support of his allegation that this is a public association. The defendant is also clearly entitled to be told the names of the majority of the party who refused to work with the plaintiff, otherwise he will not have an opportunity of meeting the charge.

Macfarlan for the defendant to oppose—As to the main application—the striking out of paragraph 4 (vi.) of the defence—all the defendant need do is to justify the substance or gist of the libel. The sting of the words complained is that the plaintiff, while an office-bearer in a working miners' association formed to protect the interests of the working miner as opposed to those of the mine-owner, applied for a position the duties of which were inconsistent with and conflicted with those of the miners' association. Whether proof that he applied for such position while holding the position of president of the association is a substantial justification of the words complained of is a question for the jury. In *Alexander* v. *North-Eastern Rly. Co.* (*c*), it was held that an allegation that the plaintiff had been sentenced to three weeks' imprisonment on a certain charge might be justified by proving he had been sentenced to two

(*a*) [1893] 1 Q.B. 571.
(*b*) [1886] 12 V.L.R. 29.
(*c*) [1865] 34 L.J.Q.B. 152; 6 B.& S. 340.

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weeks on such charge. A slight or immaterial variance between the allegation and the proof is not necessarily fatal. As to the words denying the imputation of dishonesty in dealing with the moneys of the branch, they are simply a traverse of plaintiff's innuendo. It is true defendant has already denied the innuendoes generally, but he is entitled to specifically traverse any innuendo which, if not specifically dealt with, might prejudice him in the eyes of the jury. Paragraph 5 of the defence is a defence of fair comment, not of privilege. *Gannon* v. *White* (*supra*) does not touch the present application—it dealt with an entirely different subject. *Trengove* v. *Callender* (*d*) shows that such a plea is good. The application for particulars of the facts upon which it is alleged that the A.M.A. is an public asssociation is an invitation to disclose our evidence. As to the names of the "majority of the party," proof of their names is not necessary to defendant's case. He can call Burgin, to whom the complaint was made, to prove, for instance, that there were eight in the party, and that five of them complained, though he does not remember or may never have known their names.

Levinson in reply.

HODGES, J. This is an application, firstly, to strike out sub-paragraph 6 of paragraph 4 of the defence on the ground that it is proposing to prove immaterial matter. The sub-paragraph reads: —"The plaintiff in the month of March 1899 held the position of president (and not of organizing secretary, as in the words complained of alleged), etc." (His Honor read the paragraph.) It is said that proof that he was president is no proof that he was organizing secretary, that it would be proof of irrelevant matter, and would not be proving the truth of the libel. I am not prepared at this stage of the case to say this is irrelevant matter. It may be relevant. There may be substantially no difference in the duty or importance of the office of president and that of secretary. It may be possible to prove that, so far as the thing complained of is a libel, the one may be just as bad as the other. I propose, however, to strike out the words

(*d*) [1900] 26 V.L.R. 249.

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"and not of organizing secretary, as in the words complained of alleged." The defendant does not rely on that; he relies on the fact that he was in the position of president. I don't think I can prevent his relying on that as one of the facts upon which he relies to prove the truth of the libel. The next part of the application is to strike out of paragraph 4 (vii.) the words "The defendant did not impute any dishonesty to the plaintiff or the officers of the said branch in so dealing with such moneys." This is a denial of certain language which is used in the particulars of innuendoes. But that innuendo has been previously denied. It is of the highest importance that pleadings should be kept within reasonable limits. Once the innuendo is denied it is not to be denied again *totidem verbis*. There is a tendency in modern times for pleadings to get embarrassing and of inordinate length. It is the duty of the Court to keep that down. One way is to strike out a denial which simply repeats a denial previously made.

The next application is to strike out paragraph 5 of the defence. Paragraph 5 sets up "That the Chiltern and Indigo branch of the A.M.A. is a public association," etc. (His Honor read the paragraph.) I suppose, putting that briefly, it is an allegation that the Chiltern and Indigo branch is a public association, and its acts are acts of public interest, and that comments upon these matters are matter of public interest. I don't think I should strike that out, though I confess to feeling that it is to some extent unusual and perhaps embarrassing in form. I think I ought to order better particulars to be given under it of the facts upon which it is alleged that this association is a public association. There may be some fact which may be open to much dispute upon which the defendant alleges it is a public association, and the plaintiff ought to have an opportunity of dealing with that fact.

I am also asked to order further and better particulars under the words "the majority of the party complained to the manager of your incapacity." The plaintiff wants the names of the persons who form the majority. I do not think it would be essential for the defendant to prove the names of or call the persons who formed the majority of the party. I think it

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would be sufficient, as put by counsel, if it were proved by Burgin that, though he did not know the names of the men, there were eight persons there, and five came to him and made the complaint alleged, though he does not know the names, and cannot give the names of the five or of the other three. That would be sufficient. The only thing is that it might throw some doubt upon Burgin's credibility. It may be impossible for defendant to do more than give evidence of that character. I do not think I ought to order him to give particulars of something which he could not be called upon to prove at the trial.

Order accordingly.

Solicitor for plaintiff: *Isaacs.*

Solicitor for defendant: *J. W. Robertson* (for *Whitehead,* Chiltern).

J. M.

TWOMEY *and Another v.* O'BRIEN.

HOOD, J.
1904
June 1.

Sale of liquor without a licence—Customs and Excise Duties Act 1890 (*No.* 1082), *s.* 155—*Complaint for goods sold and delivered—Defence of illegality, onus of proof of.*

By sec. 155 of the *Customs and Excise Duties Act* 1890 it is provided that it shall not be lawful for a person to sell "spirits, wine, or fermented liquor," unless such person holds a licence authorizing such sale.

In a claim for goods sold and delivered, such goods consisting of spirits and wine, at the close of the complainant's case the defendant raised the point that no licence authorizing the sale of such liquors had been proved, and he asked for judgment.

Held, that the sale of spirits and wine was unlawful only when the facts rendering it illegal had been proved, and that it was for the defendant to prove such illegality.

ORDER *nisi* TO REVIEW.

This was an order to review the decision of the Court of Petty Sessions at Melbourne.

The complainants sued the defendant for the price of wines and spirits sold to him. At the hearing one witness, in giving evidence, stated that the defendant was indebted to the complainants for goods sold and delivered according to the account, and that the goods had been delivered, and that the defendant

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had promised to pay as soon as he had sold his business. This witness, in cross-examination, was asked whether he produced a licence empowering the complainants to sell wine and spirits, and he answered "No," but that they did hold a licence, but whether in the name of the firm or not he did not know.

The defence raised at the hearing was that there had been no delivery of the goods, and, secondly, that the alleged sale was void without proof of licence. No evidence was called for the defence, but at the conclusion of the complainant's case the solicitor for the defendant asked for judgment, on the ground that no licence had been proved. The justices gave judgment for the complainants for the amount claimed. The defendant obtained an order to review such decision upon the grounds—(1) that there was no evidence that the goods had been delivered; (2) that there was no evidence that the complainants were licensed to sell the goods, and that without such licence the sale was void.

Schutt to show cause—There was sufficient evidence of the delivery of the goods, and the promise to pay for the same is clearly an admission that the goods had been delivered. As to the second ground, the sale of such goods is only unlawful when there is no licence authorizing the same, but the fact that there is no such licence must be proved by the defendant. The Court will presume that all things have been properly done, and will not presume illegality. It is not for the plaintiff to prove that the transaction was lawful; it was for the defendant to prove illegality.

Counsel referred to *Williams* v. *East India Co.* (*a*).

O'Hara Wood to move the order absolute—Section 155 of the *Customs and Excise Duties Act* 1890 makes the sale of liquor without a license unlawful. The point is raised, and the complainants should have produced the licence if it really existed. It was not for the defendant to prove a negative. The contract is unlawful unless a certain condition is complied with, and to make that contract lawful the complainants should have proved

(*a*) [1802] 3 East 192.

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that the statutory condition had been fulfilled. The complainants have no right unless they have first obeyed the Statute; it is a condition precedent which they must prove.

Counsel referred to *Smith* v. *Mawhood* (*b*).

HOOD, J. As to the first ground there is evidence, which was not objected to, that the defendant was indebted, and that the goods had been delivered; that is supported by the evidence that the defendant promised to pay. That promise is a clear admission that the goods had been delivered, or at least it was sufficient evidence to go to the justices. If the goods had not been delivered the promise to pay for them would have been idle.

As to the second ground, there was in fact some evidence that there was a licence. The witness in cross-examination said that there was a licence either in the name of the complainant or someone else. I think counsel is right in his contention that the sale would be an unlawful sale if the facts are proved rendering it unlawful, but that until such facts are proved it is lawful. The plaintiff merely says—"You have my goods and you have not paid for them." Then if the defendant sets up the defence that the sale was unlawful he must prove the facts showing the illegality; the burden is on the defendant.

Order nisi discharged, with costs.

Solicitors for complainant: *D. S. Abrahams.*
Solicitor for defendant: *R. Kelly.*

W. H. M.

(*b*) [1845] 14 M. & W. 452.

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A'BECKETT, J.

1904
May 16.

STONEHAM *v.* STONEHAM.

Husband and wife—Judicial separation—Cruelty.

In a suit for judicial separation on the ground of cruelty a decree may be granted where the evidence, though not proving bodily injury, shows injury to the petitioner's mental health.

PETITION FOR DIVORCE.

The facts and arguments are fully set out in the judgment of the Court.

Woolf for the petitioner,

Eagleson for the respondent.

Cur. adv. vult.

A'BECKETT, J., read the following judgment:—This is a petition by a wife seeking dissolution of marriage on the ground of her husband's cruelty, desertion, and adultery. It presents some strange features. At the opening of the case I was informed that only judicial separation would be asked for, and that the charge of adultery was abandoned, as the commission of the offence had been procured by the intervention of persons acting in the supposed interests of the petitioner, but without her cognizance. The charge of desertion was based on what was deposed to by the wife, and admitted by the husband, that though they had occupied the same bedroom until August 1900, when the wife went to her daughter's room, in consequence of his abusing her for asking for money, intercourse had ceased some twelve months before, and was never resumed. The circumstances under which intercourse was discontinued were not such as to make its discontinuance constructive desertion within the principle of *Simons* v. *Simons* (*a*).

The only charge remaining to be considered is cruelty. As to this, the wife gave evidence of frequent violent abuse and foul names addressed to her in the presence of her children. On one occasion he gave her a black eye. He spat in her face, and several times threatened to beat her with a strap. The

(*a*) [1898] 24 V.L.R. 348.

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wife and children were often short of food, and on these occasions his indifference to his wife's wants, and his insulting language to her, were most reprehensible. I believe that the privations she had to endure were not always due to his inability to provide for her. As to the truth of the charges made against him, in face of his general denial, covering matters as to which the wife was fully corroborated, I must accept her testimony on some of the charges which are supported by her evidence alone. He was absent from Victoria in 1899 on a professional engagement, and during his absence she found in his box an extraordinary collection of papers written by him on various subjects not material here, but some distinctly suggesting that his wife had been unfaithful to him, and that she had been pregnant, but not by him. The finding of these papers embittered relations which had previously been generally affectionate. Unfortunately, she did not show him the papers, but asked for explanations without formulating in any distinct way the facts or charges which she wished to have explained. He declined to give any explanation, and so matters went from bad to worse. It has been suggested that this suit was prompted by religious dfferences, but I do not think so. The husband was a Protestant, the wife a Catholic; the children sometimes went with his consent to a Catholic Church, and sometimes were taken by him to a Protestant Church. Quarrels arose now and then about his, but differences were generally on other matters. The wife's conduct appears to me to have been blameless. She has struggled to maintain order and decency in a home where want of means, and her husband's occasional offences against decency, made it very difficult to do so. The cause of final separation in June 1903 was the wife having been told of the adultery to which I have before alluded. Taking all the circumstances into consideration, I think she has made out a case for judicial separation if the acts proved against her husband amount to cruelty within the meaning of the Act.

As to this, counsel for the respondent pointed out that in cases of judicial separation the Court is, by sec. 61, thrown back to the ecclesiastical law prevailing in England in 1865, and under that law a divorce *a mensâ et thoro* would not be granted

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unless the acts of cruelty proved endangered the wife's health or personal safety. The same necessity for considering the old law exists under the English Act from which ours was taken. In *Brown on Divorce* (6th ed.), p. 128, it is observed that the distinction must always be carefully borne in mind between a definition of cruelty in a case of judicial separation where the Court is still hampered by the principles and rules of the ecclesiastical courts and cases of dissolution of marriage where it has a free hand. This leads to a somewhat strange result —that what may rightly be considered "cruelty" for some purposes of the Act may not be cruelty for the purpose of judicial separation. According to some of the authorities which support the rule as broadly stated by counsel, I should have felt unable to grant relief in this case, as the evidence did not satisfy me that the wife's health had been injured by her husband's misconduct. There are, however, cases in which relief has been given which show that the rule as above stated must be considerably qualified.

The latest exposition of the law on this subject is to be found in the case of *Russell* v. *Russell*, where in the Court of Appeal and in the House of Lords (*b*) most eminent Judges took opposing views. The question there was whether Lady Russell's persistent false charges against Lord Russell of having committed an unnatural offence amounted to cruelty which would have entitled him to a judicial separation. The majority in both Courts held that they did not, but although the Earl's health was in no way affected, or likely to be, the Lord Chancellor, Lords Hobhouse, Ashbourne, and Morris, and Lord Justice Rigby held that a case of cruelty which would have entitled him to judicial separation had been made out. Lord Justice Lopes, who was one of the majority, defined legal cruelty thus:—"There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it." This reference to mental health is repeated in other parts of the judgment, and in the judgment of Lord Davey in the House of Lords. When mental, as distinguished from bodily health, can be taken into consideration, a wide door is opened, and the Court can give

(*b*) [1895] P. 315; [1897] A.C. 395.

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relief for offences which operate injuriously on the mind only. Cases are referred to in the judgments in which relief was given, though the bodily injury was as little as in the case before me: *Milner* v. *Milner* (*c*), at p. 339 of the first report, and *Bray* v. *Bray* (*d*), at p. 430 of the second report; *Furlonger* v. *Furlonger* (*e*), p. 433, and *Saunders* v. *Saunders* (*f*), p. 435. On the whole, I feel warranted by authority in holding the acts proved here to amount to cruelty, entitling the wife to judicial separation, which I accordingly grant, with costs.

Solicitor for petitioner: *Corr.*
Solicitors for respondent: *Gaunson & Lonie.*

W. H. M.

In re THE INCOME TAX ACTS (No. 3).

F.C.
1904
May 31, *June* 2

Income Tax Act 1895 (*No.* 1374), *ss.* 2, 9 (11)—"*Income from personal exertion*"—*Bonus voted from year to year by company to employé—Reward for personal services—Continuity of payment—Probability of recurrence—"Granted secured or allowed.*"

A. had been managing director of a company for 16 years at a salary of 600*l.* per annum, and during each such year there had been voted to him by a resolution of the shareholders at the annual general meeting of the company the sum of 250*l.* as a bonus.

Held, that the Commissioner of Taxes rightly assessed the sums so received during the last four years as being income derived from personal exertion, and subject to income tax.

It is not necessary that a "bonus" should have been received under an express agreement that it should be part of the payment for personal exertion in order to render it liable to income tax. Section 9, sub-sec. 11, of the *Income Tax Act* 1895 covers all payments for services rendered by personal exertion; and where such payments are of a recurring nature they are liable to income tax.

CASE stated for the opinion of the Supreme Court as follows:—

"(1.) During the years 1899, 1900, 1901, and 1902, and for some time prior thereto, the taxpayer was and still is the managing director of the X. Company, and as such managing director he received in each of the years referred to a salary of 600*l.*

(*c*) 4 Swab. & Tr. 240.
(*d*) 1 Hagg. Ecc. 163.
(*e*) 5 N. of C. 425.
(*f*) 1 Rob. Ecc. 549.

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"(2.) In each of the said years a sum of 250*l.* was, at the annual meeting of shareholders, voted to the said taxpayer by a resolution, which appeared in the minute book on each occasion substantially in the words following, viz.—'That a bonus of 250*l.* be given to the managing director, together with a hearty vote of thanks,' on one occasion the words 'for his services during the past year' being added.

"(3.) The said taxpayer not having included the said sums of 250*l.* in the returns of his income for the several years above-mentioned, the Commissioner of Taxes made assessments, and called upon the said taxpayer to pay income tax on each of the said sums of 250*l.*, as being income subject to tax for the years 1900, 1901, 1902, and 1903 respectively, derived from personal exertion.

"(4.) The said taxpayer duly lodged objections to the said assessments, which were disallowed by the Commissioner, and such objections came before me for hearing and determination on the 29th February 1904, and, after hearing counsel for the taxpayer and for the Commissioner respectively, I, on the application of counsel for the Commissioner of Taxes, stated this case.

"A copy of my notes taken on the hearing of the objections herein is to be deemed to form part of this case."

These notes, so far as they are material and supplementary to the facts above stated, were as follow:—"The secretary of the company stated in evidence—'There was no agreement or understanding between the company and the taxpayer for the payment of these moneys. It was voted each year at the annual meeting on the motion of some shareholders.' Cross-examined: 'On each occasion some complimentary reference was made to the taxpayer's services, and on several occasions the remarks have included other members of the staff.' To the Court: 'A similar bonus has been voted and paid each year since 1888. The first covered a period of 16 months. The taxpayer has been managing director ever since the foundation of the company in 1887.' Re-examined: 'Each of these years was a prosperous year, the company paying 10 or 12½ per cent. dividends.'"

"(5.) The question for the opinion of the Court is—Is the said taxpayer liable to pay income tax in respect of the said

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amounts set out in paragraph 2 hereof as tax upon income derived from personal exertion?"

A. W. CHOMLEY,
Judge of County Court.

Box for the Commissioner of Taxes—Sec. 2 of the *Income Tax Act* 1895 defines "income from personal exertion" to be, *inter alia*, "all income consisting of earnings salaries wages allowances, etc., earned in or derived from Victoria," while sec. 9, sub-sec. 11, declares that "the estimated annual value of any residence quarters or board and residence and every amount received or receivable by way of extra salary bonus or emolument and every allowance benefit or advantage of any kind whether in money or otherwise or of a like nature or any modification or combination of any such benefit or advantage granted secured or allowed to any person shall be deemed to be part of the income of such person and subject to be taxed accordingly." The words "granted secured or allowed" are to be read as qualifying the words "allowance benefit or advantage etc.," and those words only, and the intention of the Act is to tax any amount whatever received or receivable by way of extra salary, bonus, or emolument. Although the bonus, or allowance, or whatever it may be called, which a taxpayer receives may be purely voluntary, and may not be legally enforceable, still if there be a fairly fixed expectation or a reasonable probability of its recurrence from year to year, and if, moreover, it be given to him for or in respect of services rendered by him to the donor, or for or in respect of the office which he holds, it is deemed to be income, and is subject to taxation. In *In re Income Tax Acts* (No. 2) (*a*) Hood, J., says:—"Primarily 'income' means anything that comes in, but the Court has placed certain limitations on that meaning. The first limitation is that it shall not include moneys received by accident, such as gifts. The second is that to be taxable it must be in its nature probably recurring —something that would happen yearly." Shortly the tests to be applied in regard to this bonus are:—(1) Was it probable that it would recur? (2) Was it connected with the services of

(*a*) [1901] 27 V.L.R. 39, at p. 41.

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the taxpayer? As to (1), the taxpayer has received a similar bonus for sixteen years; and (2) is obvious, and in this respect this case is clearly distinguishable from the case of *In re A.B.* (*b*), where the payments were a pure act of benevolence for a limited period to the widow of a deceased officer, and not to a person who had rendered and was to render services. The case of *Herbert* v. *McQuade* (*c*), although the decision turns to some extent on the words "by reason of his office" in the English *Income Tax Act* 1842, still suggests the true test in all these cases. See per Collins, M.R., at p. 649:—"It is a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it." If by putting forward his best efforts in the business the taxpayer may hope to get extra payment of any sort, such payment is taxable. Here the bonus is paid both as a reward for his services, and as a spur to his efforts in the future.

Schutt for the taxpayer—All the words in sec. 2 relate to payments to which the recipient has some legal, if not enforceable, claim, and he must have "*earned*" the money in question; while in the case of *In re the Income Tax Acts* (No. 4) (*d*) it was held by Hood, J., that the words "granted secured and allowed" in sec. 9 (11) must mean granted, secured, or allowed so as to be legally enforceable, the learned Judge saying that, if the intention of the Legislature was to include a gift or gratuity, it could easily have added the word "given." The section, being capable of this construction, should be so construed in favour of the taxpayer. The true test is whether the amount received is an amount the receipt of which was contemplated at the time the recipient undertook to give his services—in other words, was it part of the terms of his contract for employment that he should receive these bonuses? If not, then they are not tax-

(*b*) [1896] 18 A.L.T. 67. (*c*) [1902] 2 K.B. 631.
(*d*) [1897] 23 V.L.R. 435.

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able; and the case states that there was no agreement as to the payment of these sums. Their payment was purely optional with the shareholders, and, of course, to some extent depended upon the success of the year's operations. On each occasion before the bonus was given to the taxpayer all the consideration on his part was past or executed, and he could not have complained if he had not got anything.

[A'BECKETT, J. There is little doubt but that in this case there was an honourable understanding, arising out of conduct, that if he did his work successfully he would get the bonus he had always got before. In your view, if a barrister's fees were honorary, as formerly, he would not have to pay income tax upon them.]

It would be part of the contract of his employment that they should be paid, though they might not be legally enforceable.

[A'BECKETT, J. Supposing a waiter were to make 1000*l.* a year in tips, I should say he would be clearly liable to pay income tax upon them.]

Not unless there were words in the Act to cover them, and there are no such words in this Act. The reason why the payments made in the case of *In re A. B.* (*e*) were not taxable was merely because they were made in respect of the services of the deceased officer, and therefore in respect of a past consideration. The word "income," occurring with the word "salary," in the English *Bankruptcy Acts* has been defined to cover only cases where the bankrupt was in receipt of money to which he had a legal claim. *Cf. Ex parte Wicks* (*f*) and *Ex parte Webber* (*g*).

Counsel also referred to *In re Everitt* (*h*); *In re Patterson* (*i*); and *In re the Income Tax Acts* (*k*).

Box in reply.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., A'BECKETT and HODGES, JJ.] In our opinion the question before us in this case ought to be answered "Yes."

(*e*) 18 A.L.T. 67.
(*f*) [1881] 17 Ch. D. 70.
(*g*) [1886] 18 Q.B.D. 111.
(*h*) [1896] 21 V.L.R. 481.
(*i*) [1896] 2 A.L.R. 152.
(*k*) [1900] 26 V.L.R. 297, at p. 208.

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The *Income Tax Act* 1895 intends, so far as the branch of its scheme before us to-day is concerned, that income derived from personal exertion shall be subject to tax, and it then proceeds to define what income derived from personal exertion is to mean, viz., "all income consisting of earnings salaries wages allowances pensions superannuation or retiring allowances or stipends earned in or derived from Victoria and all income arising or accruing from any trade carried on in Victoria" (sec. 2). That is undoubtedly the colouring feature of the enactment in relation to this branch of its subject. Having defined in a more or less rigid way what it intends to tax, it then, by sec. 9, sub-sec. (11), amongst other things provides that "the estimated annual value of any residence quarters or board and residence and every amount received or receivable by way of extra salary bonus or emolument and every allowance benefit or advantage of any kind whether in money or otherwise or of a like nature or any modification or combination of any such benefit or advantage granted secured or allowed to any person shall be deemed to be part of the income of such person and subject to be taxed accordingly." It is quite clear, therefore, that, while the Legislature is remembering that it is seeking to tax income from personal exertion, and that it has defined for general purposes what that income is to be, it then proceeds to add something else, which is not income in the ordinary sense, but which is to be "deemed to be part of the income of such person." So that it first of all lays down the general rule as to what is income, and then it goes on artificially to make that income which is not income in the ordinary sense, but which it intends shall be deemed to be income. The words employed in so doing are exceedingly comprehensive, and therefore it is not a question of assigning the meaning to be given to the word "income," but the difficulty of getting rid of anything or everything that might come within that comprehensive expression. The word "income" itself has already been held to be too wide an expression if one regards it in its primary meaning as everything which "comes in" within the year. There are many things which "come in" within the year which are not income. In the same way the literal meaning of

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this section would make any form of bonus—bonuses being the particular question before us—subject to taxation.

It is argued here that sub-sec. 11 of sec. 9 merely refers to bonuses secured by law or embodied by express contract as part of the reward of the man who is bestowing personal exertion. But the first objection to that is this—that if you have a contract in which such a thing is expressed—in which you have a bonus provided for—the whole is salary in the wider sense, although the man may have a definite salary called such, and may have an indefinite part called "bonus." Therefore it was unnecessary for the Legislature to have indicated this at all, if that were the only purpose. But we find a very general class of returns which are outside the ordinary agreed for salary or stipend, and for which the Legislature seeks to provide by sec. 9 (11). We find that these are numerous and generally expressed, and the nature of their source is provided for in singularly comprehensive language. They are to be any of these things expressed to be "granted secured or allowed" to any person. Now anything that is "granted or secured" by a binding contract is provided for first, and then disjunctively it is provided that things "allowed" to any person shall be deemed to be part of his income. That language is as wide as it could possibly be, howsoever the bonus comes to hand. As I have already indicated, we have only to say what that general expression does not cover, because apparently it covers everything. There is a line of decisions which shows that those things which are merely gifts, and which have no relation to personal exertion, or bear only a distant relation to personal exertion—which is the keynote of this branch of the Statute—are not to be regarded as income. They are mere gifts and stand aside. But this subsection, if any meaning is to be given to it, does appear to cover all returns for services rendered by the personal exertion of some individual. If you once get that particular relation established as the test, then the rest is easy; and in order to give effect to the section you must arrive at some such construction if you are to give it any meaning at all. In the present instance the alleged taxpayer, although he had no bargain with the company that he should receive a bonus from it, nevertheless each year,

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for many years in succession, had provided for him—it is true, by the concession of the company or its shareholders—that which they called a bonus; but it is perfectly obvious that they were not bestowing any benevolence upon him, as a man might bestow benevolence on his impecunious friend, or give alms to a beggar; but he got it because his personal exertions had been well disposed to the satisfaction of his employers and to their great advantage. It is with them a matter of business, and therefore they give him that which otherwise they would not dream of giving away; and they give it because they think that the expectation he will have of receiving similar bonuses in future years will stimulate him to further services over and above what he would be prepared to give for the mere salary alone. Again, the continuity of this series of bonuses is an element in determining whether they were a mere benevolence, or whether they may be regarded as having been given in respect of personal exertion, and as a return which the company was willing to pay, and which the taxpayer had a very reasonable expectation of receiving. We think that is the least interpretation which we should put on the generality of this section. The question will be answered "Yes," and the assessment will be affirmed. In the special circumstances of this case there will be no costs.

Assessment affirmed.

Solicitor for the taxpayer: *G. P. Newman.*

Solicitor for the Commissioner of Taxes: *Guinness*, Crown Solicitor.

H. I. C.

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SUTTONS PROPRIETARY LIMITED *v.* RICHARDS.

HOOD, J.

1904
May 25, June 1.

Agreement for purchase and hire—Hirer to pay monthly rent till total sum paid—Absolute contract to purchase—Arrears of instalments—Use and hire—Form of action—Jurisdiction of justices.

Under a purchase and hiring agreement relating to an organ, the hirer agreed to pay a deposit, and to pay 11*s.* every month "during the continuance of the contract," and that as soon as the hirer had paid the total sum of 27*l.* 10*s.* the organ should become his absolute property.

Held an absolute contract to purchase, and consequently the instalments could not be recovered as use and hire, although so designated in the agreement, nor was the amount of such instalments recoverable as for goods sold and delivered, because the property in the article still remained in the vendor.

ORDER TO REVIEW.

The complainant sold to the defendant an organ under a time-payment agreement in the following terms (*inter alia*):—

"HIRE CONTRACT.

"The undersigned, hereinafter called the hirer, agrees to hire from Suttons Proprietary Limited, Bendigo, on the terms and conditions hereinafter stated, a certain Mason and Hamlin cabinet organ, value 27*l.* 10*s.*, hereinafter called an instrument:—

"1. The said hirer shall pay to the said Suttons Proprietary Limited, before the delivery of the said instrument, the sum of one pound, and shall also pay to the said Suttons Proprietary Limited, every month during the continuance of this contract, the sum of eleven shillings, the first of which said monthly payment shall be made on the 4th day of December now next ensuing.

"2. That when and as soon as the said hirer shall have paid to the said Suttons Proprietary Limited the total sum of 27*l.* 10*s.* (promissory notes, bills, or cheques not included until paid), and all other sums payable under this contract, the said instrument shall become the absolute property of the said hirer, and not before, and in the meantime the said hirer shall have no property whatsoever in the said instrument.

"3. That the said instrument shall not at any time during

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the continuance of this contract be removed from the premises of the said hirer without the previous consent in writing of the said Suttons Proprietary Limited by any person whomsoever under any pretence or for any reason whatever.

"4. That if the said hirer shall make any default in payment of the said sum payable before delivery of the said instrument, or in the due payment of any one of the other sums herein provided for, or if the said instrument be removed contrary to clause 3 hereof, or in case the said instrument is levied upon or seized under any warrant of distress, judgment, or order of any court of law, or any proceedings against the said hirer at the suit or instance of any person, or the said hirer shall become insolvent or assign his estate or effects for the benefit of any creditor, then and in either of such cases the said Suttons Proprietary Limited, or their agents, shall be at liberty to take back into their possession and retain the said instrument as if this present contract had not been made, and for that purpose to enter any house, room, or place where the same may be, of the leave and license to do which this contract shall be conclusive evidence and may be pleaded in bar to any action brought for such entry.

"5. If the said hirer fails to deliver up the said instrument to the said Suttons Proprietary Limited, or their agents, on demand, by reason of seizure by landlord or other creditors, destruction by fire, or from any cause whatsoever, the said hirer shall become liable to the said Suttons Proprietary Limited for the immediate payment of full value of the said instrument as above stated.

"6. The said hirer shall be responsible for any damage (fair wear and tear only excepted) the instrument may sustain while in the said hirer's possession.

"7. In case of default in any payment, the hirer shall pay monthly to the said Suttons Proprietary Limited, at their option, a charge at the rate of 7½ per cent. per annum upon the value of the said instrument, as above stated, for every month such payment shall remain unpaid, and in default of payment of such charge, the same shall be added to the value of the said instrument, which shall not become the property of the said hirer

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until all such charges be paid, and arrears of all other payments be made.

"Dated this 4th day of November, 1903.

"(Signed) CHRISTOPHER RICHARDS.

"Witness—F. C. Harrison."

One penny stamp, cancelled.

Defendant paid the 1*l.* deposit on 4th November, and took delivery of the instrument, but returned it to the complainants' warehouse on 5th December, where it was received by an *employé* without authority, and the defendant was immediately afterwards notified in writing that he must remove it and complete his contract. He did not remove the organ.

On 9th December an instalment of 11*s.* was paid by defendant, and upon a summons being issued, another instalment was paid, with costs. Complainant now sued for three instalments of hire. The complainant claimed "for the use and hire of a certain chattel, viz., one Mason and Hamlin cabinet organ, from the 4th January to 4th March 1904, at 11*s.* per month, by the said Suttons Proprietary Ltd. then and there let to hire and delivered to you at your request."

It was admitted by the complainant that two instalments only were due, and the Court of Petty Sessions at Bendigo made an order on 18th April for 1*l.* 2*s.*, and 2*l.* 4*s.* 6*d.* costs. Defendant obtained his order *nisi* to review upon the grounds:—

1. That there was no evidence of use and hire of the organ, which was not paid for.

2. That, on its true construction, the contract was a hiring contract only, terminable on reasonable notice, and not a hire and purchase agreement.

3. That the contract created no obligation on the defendant to purchase, but gave him an option only to purchase.

4. That if defendant is bound by the written contract, notwithstanding the return of the organ, then the Court had no jurisdiction to hear the complaint.

Bryant to move the order absolute.

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Shiels, to show cause, cited, as to the construction of the agreement: *Helby* v. *Matthews* (*a*); *Lee* v. *Butler* (*b*); *Hull Ropes Co.* v. *Adams* (*c*); *Thompson* v. *Veale* (*d*). As to defendant's right to raise the point of jurisdiction now for the first time: *Macarthur* v. *Harvey* (*e*). As to the jurisdiction: *Horsburgh* v. *Christie* (*f*); *Laven* v. *Flower* (*g*); *Sales of Goods Act* 1896 (No. 1422), sec. 53 (2).

Bryant—In the cases cited the hirer agreed to pay instalments until the total was paid. *Landlord and Tenant Act* 1890, sec. 22, was a sufficient authority for *Horsburgh* v. *Christie*.

Cur. adv. vult.

HOOD, J. The first three grounds of this order to review depend upon the construction to be placed upon the agreement made between the parties, and in my opinion that agreement is in substance a contract of sale. The value of the instrument is fixed at 27*l.* 10*s.* The defendant agrees to pay on delivery 1*l.*, and the sum of 11*s.* every month during the continuance of the contract, and when and as soon as he shall have paid the total sum of 27*l.* 10*s.* (that is, the value of the organ) it shall become his absolute property. The contract, therefore, is to be continued until the defendant has paid 26*l.* 10*s.* by monthly instalments, and I think that there is a distinct undertaking by him to pay that amount in that way. The other provisions are only inserted in order to protect the vendor. This agreement is very loosely worded, but in effect it agrees with that in the case of *Helby* v. *Matthews* (*h*), except that there was in that contract a special right in the hirer to determine the agreement, and Lord Shand, referring to the clauses as to payment of the instalments, said—"If these stipulations had been unqualified, there would have been an absolute obligation or agreement by Brewster to acquire the instrument in property and by purchase, although the instalments were described as for rent or hire, and the case of *Lee* v.

(*a*) [1895] A.C. 471.
(*b*) [1893] 2 Q.B. 318.
(*c*) [1895] 65 L.J.Q.B. 114.
(*d*) [1898] 74 L.T. 130.
(*e*) [1894] 15 A.L.T. 228.
(*f*) [1900] 26 V.L.R. 399.
(*g*) [1874] 5 A.J.R. 71.
(*h*) [1895] A.C. 471.

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Butler (*i*) would have directly applied." In the present case these stipulations are unqualified, and so the contract is an absolute agreement to purchase, and the defendant fails on the main point.

This view, however, is fatal to the complainants on the fourth ground. They sued for use and hire, and if the contract had borne that interpretation, there might have been jurisdiction; but the real contract being one of purchase, the instalments of purchase money cannot be recovered as rent, even though the parties have chosen so to designate them, and a claim for goods sold and delivered would not lie, because the property in the article remained by the contract in the vendors: *Atkinson* v. *Bell* (*k*).

It has also been decided that where goods have been sold outright, but the payment is to be by instalments, the *indebitatus* counts would not lie till the whole debt was due: *Bullen and Leake* (3rd ed.), 37. Reference was made to sec. 53 (2) of the *Sale of Goods Act*, but that does not relate to the form of action. The price in such a case is recoverable by an action on the contract—*Dunlop* v. *Grote* (*l*)—and the Court of Petty Sessions has no jurisdiction to deal with such a claim. As this point was not taken below, there will be no costs.

Order absolute, without costs.

Solicitor for complainants: *Connelly & Crocker* (for *Connelly, Tatchell & Dunlop*).

Solicitor for defendant: *Rodd* (for *Murphy*).

W. H. M.

(*i*) [1893] 2 Q.B. 318.
(*k*) [1828] 8 B. & C. 277.
(*l*) [1846] 2 C. & K. 153.

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DEAKIN'S AND LYNE'S CASES.

Constitutional law—Commonwealth and State authority—Interference by State with Federal instrumentality or agency—Salary or allowance of member of Commonwealth Parliament—Salary or allowance of Commonwealth Minister of the Crown—Salary for work done in buildings exclusively vested in the Commonwealth—Liability to taxation by State Legislature—Income tax—Salary earned in Victoria—Divisibility of salary for purposes of Income Tax Acts—Income earned, but not yet received—Income Tax Act 1895 (*No.* 1374), *ss.* 2, 7 (1) (*a*), 14—*Commonwealth of Australia Constitution Act* (63 *&* 64 *Vict.*, *c.* 15), *ss.* 48, 66.

The salary or allowance of a member of the Commonwealth Parliament is liable to income tax under the Victorian *Income Tax Act* 1895 so far as it is earned in Victoria.

Section 7 (1) (*a*) of the Victorian *Income Tax Act* 1895 does not exempt from taxation the salary or allowance of a Commonwealth Minister of the Crown, but such salary or allowance is liable to income tax under such Act so far as it is earned in Victoria.

Income tax is payable under the *Income Tax Act* 1895 only upon the amount of income which has been actually received by the taxpayer during the taxable year, and not upon money earned by, but not paid to him, during such year.

In re the Income Tax Acts (No. 4): *Wollaston's Case* (28 V.L.R. 357) followed.

D'Emden v. *Pedder* ([1904] 1 C.L.R. 91) distinguished.

The *dicta* of the High Court of Australia in *D'Emden* v. *Pedder* (1 C.L.R. 91) as to the applicability of the United States decisions to the interpretation of the *Commonwealth of Australia Constitution Act* not followed; but the principle of the decision of the Privy Council in *Bank of Toronto* v. *Lambe* ([1887] 12 App. Cas. 575, at p. 587) applied.

CASES STATED by the Commissioner of Taxes for the opinion of the Supreme Court, and referred by Holroyd, J., to the Full Court:—

THE HONOURABLE ALFRED DEAKIN'S CASE.

(1.) The Honourable Alfred Deakin was from and after the 9th May 1901 a member of the House of Representatives, and from and after the 1st January 1901 one of the King's Ministers of State for the Commonwealth of Australia, and was during the year 1901 domiciled and resident in Victoria.

(2.) The said Alfred Deakin received under sec. 48 of the Constitution of the Commonwealth of Australia an allowance of

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233*l.* for 1901 as member of the House of Representatives, and for the same year received also as Minister of State 1650*l.*, being portion of the sum of 12,000*l.* payable to the King for the salaries of the Ministers of State under sec. 66 of the said Constitution.

(3.) The electoral division in respect of which the said Alfred Deakin was a member of the House of Representatives was in the State of Victoria.

(4.) The House of Representatives sat for the first time on the 9th May 1901, on which day the said Alfred Deakin took his seat, and the said House sat at all times hitherto in Victoria.

(5.) The work done by the said Alfred Deakin as Minister and as a member as aforesaid, and in respect of which he received the moneys hereinbefore mentioned, was, so far as his personal action is concerned, nearly all performed by him in and from Melbourne, although his responsibilities extended to all the Australian Commonwealth, and as Minister he attended His Excellency the Governor-General and met his colleagues in Cabinet on eight occasions in Sydney and on sixty-eight occasions in Victoria, and corresponded (principally from Melbourne) with Federal officials in the several States of the Commonwealth with regard to Customs prosecutions and other matters.

(6.) The said moneys were paid to and received by the said Alfred Deakin in Melbourne by payment of the said moneys into his account at the Union Bank of Australia, Melbourne.

(7.) In assessing the income of the said Alfred Deakin for the purpose of income tax, I included the said sums of 233*l.* and 1650*l.* The taxpayer objected to such assessment on the ground that the said sums should not have been included.

The question for the opinion of the Court is—Were the said sums of 233*l.* and 1650*l.*, or was either and which of them, or any and what portion thereof, rightly included in the said assessment.

THOS. PROUT WEBB,
Commissioner of Taxes.

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SIR WILLIAM JOHN LYNE'S CASE.

This case differed from the preceding case, so far as material to this report, in the following particulars:—

(*a.*) During the said year 1901 the said Sir William John Lyne was domiciled not in Victoria but in New South Wales, but generally during the session of Parliament came to Melbourne on Tuesday and left Melbourne for Sydney on Friday evening. During adjournments of the House he generally remained in Sydney, and during the sitting of the House he occasionally remained in Melbourne from Friday to Tuesday.

(*b.*) The electoral division in respect of which the said Sir William John Lyne was a member of the House of Representatives was in the State of New South Wales.

(*c.*) The said moneys were paid to and received by the said Sir William John Lyne in Sydney by payment of the said moneys into his account at the Bank of New South Wales.

It was also stated in the case that the work of Sir William Lyne, both in Melbourne and Sydney, was done in the Commonwealth offices.

The two cases were argued together.

Isaacs, K.C. (with him *Bryant*), for the Commissioner of Taxes—The question in these cases is in no way distinguishable from that already decided by this Court in *Wollaston's Case* (*a*). The Commissioner relies entirely upon that case. The cases of *D'Emden* v. *Pedder* (*b*) and *Municipal Council of Sydney* v. *Commonwealth of Australia* (*c*) have no application to these cases.

[PER CURIAM. We are entirely of that opinion.]

Higgins, K.C., and *Drake* for the taxpayers—One of the reasons why it was held in *Wollaston's Case* (*d*) that the tax on the salary of a Commonwealth officer was not an interference with an instrumentality of the Commonwealth Government was that the tax was assessed on the money after it had *got*

(*a*) [1902] 28 V.L.R. 357.
(*b*) [1904] 1 C.L.R. 91.
(*c*) [1904] 1 C.L.R. 208.
(*d*) 28 V.L.R. 357.

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into the taxpayer's pocket. But that is not so; it is assessed on the money when it is earned. Under the *Income Tax Act* 1895 the tax would be payable upon the salaries in question here whether they had been paid or not. A taxpayer has to enter in his returns all his earnings whether they have been actually received or not, and whatever part of them he is unable to mark off as bad debts which will not be paid to him, he has to pay tax upon: See sec. 14, which provides that "returns of income shall be based upon the amount of income which was earned derived or received by the taxpayer during the year," etc.

[HODGES, J. If what you say is correct, a man would have to include in his schedule each year money received during such year, but really earned the preceding year, which had been included in the preceding year's schedule, and upon which tax had already been paid; and in this way he would pay the tax upon it twice. You say it is income, although it has not "come in?"]

[*Isaacs*—The Commissioner has to "estimate the balance of income liable to tax"—sec. 9 (2)—and, as a matter of practice, the tax is never charged upon any earnings which have not actually been received during the year. In any case the contention is not open in these cases, because it is admitted that the moneys in question here have been paid.]

It is "income earned," although it has not come in.

[PER CURIAM. We are all of opinion that the Act taxes only what is actually received during the taxable year.]

Higgins, K.C.—The *Commonwealth of Australia Constitution Act*, sec. 48, provides that, "until the Parliament otherwise provides each Senator and each member of the House of Representatives shall receive an *allowance* of four hundred pounds a year to be reckoned from the day on which he takes his seat," and sec. 66 provides that "there shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth for the salaries of Ministers of State an annual sum which until the Parliament otherwise provides shall not exceed twelve thousand pounds a year." The

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salaries of members of the Federal Parliament are not paid to them by way of wages, but by way of allowance for the expenses to which they are or may be put in travelling from all parts of the Commonwealth in attending to their duties, and in some cases in setting up new homes. They are not "earnings" within the meaning of the Victorian *Income Tax Acts*, and ought not to be taxed. Again, sec. 7 (1) of the *Income Tax Act* 1895 provides that "subject to the provisions of this Act there shall be exempt from income tax all income derived or received (*a*) by Her Majesty or any Minister of the Crown as such Minister or the Board of Land and Works the Victorian Railways Commissioners the Marine Board of Victoria the Harbour Trust Commissioners the Melbourne and Metropolitan Board of Works . . . . or any local authority in so far as such income is official and not personal; (*b*) by the Governor of the Colony so far as respects the emoluments of his office as Governor." This section has been interpreted in practice as not exempting the salary of a Minister of the Crown. It is not, however, easy to see what sums are payable to a Minister of the Crown as such Minister, because all official payments go straight into the consolidated revenue.

[A'BECKETT, J. The salaries would not be received as Minister, but as Mr. Deakin or as Sir William Lyne.]

Literally, the words "in so far as such income is official" certainly cover these salaries, which are plainly "official." It is extraordinary that income tax can be levied upon the "emoluments of the office" of the Governor-General, who is clearly a Federal instrumentality, though those of the State Governor are exempt. It cannot be said that the section relates only to the State Ministers of the Crown, because the Crown is "one and indivisible." *Cf.* 235 *Hansard* (*English*), 3rd series, at pp. 1131 *et seq.* If you tax the salary of a Commonwealth officer, it either falls on him personally, rendering his office less desirable, or upon the Commonwealth Government, in that it may be obliged to pay a higher salary to get equally efficient services.

[HODGES, J. Would you say that if a contractor erects a building for the Commonwealth Government it would be

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hampering or impeding that Government if the contractor be charged income tax upon the profits of that contract ?]

Yes, for the reason that he would be obliged to tender at a higher price in order to get the same margin of profit.

[HODGES, J. It will be said directly that it is unconstitutional for the State to tax a butcher who supplies a Federal officer with meat.]

According to the United States decisions, a State could levy a poll-tax upon every Commonwealth officer, but it cannot levy income tax upon their salaries. As soon as ever the money gets into the pocket of the Commonwealth officer, and he spends it (say) on property, that property may be taxable.

[PER CURIAM. If a State poll-tax were to fall solely on Commonwealth officers, or more heavily on them than on other persons in the community, it would, we think, be clearly unconstitutional and invalid.]

If the question is whether the tax is imposed upon the taxpayer as a Federal officer, then this tax is imposed upon the taxpayers here as Federal officers, because it is imposed upon their Federal salaries. Although in *Wollaston's Case* (*e*) it was held that the taxpayer was liable to pay tax in respect of that portion of his salary which might be allocated to the time he was in Victoria, there is no machinery in the *Income Tax Acts* for any such apportionment.

[A'BECKETT, J. We had that argument before us in that case, and we have decided that such an apportionment is permissible under the Act. (He referred to *Re A. B.* (*f*).)]

In Sir William Lyne's case the question of domicile is to be considered.

[PER CURIAM. Domicile has nothing to do with the question of liability to taxation under the Victorian *Income Tax Acts.*]

It is admitted that the case of *D'Emden* v. *Pedder* (*g*) is quite distinct from these cases—that there is a great distinction between the question whether a State Act can compel one Commonwealth officer to put a receipt stamp upon a document

(*e*) 28 V.L.R. 357. (*f*) [1899] 4 A.L.R. (C.N.) 37.
(*g*) [1904] 1 C.L.R. 91.

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given to another Commonwealth officer, and the question whether a State Act can impose a tax upon the income of a Commonwealth officer given to him for carrying out his duties to the Commonwealth Government. Still the High Court in that case—in direct antagonism to this Court in *Wollaston's Case* (*h*)—has intimated its opinion that the doctrines laid down by Marshall, C.J., in *McCulloch* v. *the State of Maryland* (*i*), and by his successors in other cases, are applicable to the interpretation of the Constitution of the Commonwealth.

[A'BECKETT, J. There is nothing in the principle of *McCulloch* v. *State of Maryland* which says that a Federal officer's income is not to be touched. The position in each of the cases before us merely is that the taxpayer is not permitted to say that the salary he gets from the Commonwealth is not part of his income.]

Counsel referred to *Dobbins* v. *Commissioners of Erie County* (*k*).

[MADDEN, C.J. That is one of the cases dealt with in *Wollaston's Case* (*l*). It is undoubted that some of the United States authorities have gone further than Marshall, C.J., in *McCulloch* v. *State of Maryland* (*m*). The principle of that case, which is the root of the whole matter, does not necessarily go to support the subsequent decisions, and they apparently stop short of the principle which would support the taxpayers' position here. The arguments derivable from the United States cases have already been addressed to us, and, whether rightly or wrongly, we did not yield to them. Of course, if it were fairly clear to us that the High Court had practically overruled the decision in *Wollaston's Case*, then we would certainly not adhere captiously to our own decision.

A'BECKETT, J. I do not think you will find in or extract from the judgment in *D'Emden* v. *Pedder* (*n*), a word to indicate that, because the State law lessened the income of the Commonwealth officer concerned, that was the reason why the High Court decided in the way they did. Short of showing

(*h*) 28 V.L.R. 357.
(*i*) [1819] 4 Wheat. 316.
(*k*) [1842] 16 Peters 435.
(*l*) 28 V.L.R. 357.
(*m*) 4 Wheat 316.
(*n*) 1 C.L.R. 91.

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that the decision of the High Court is the other way, there is no use in pointing out to us that our former decision is wrong.]

All of your Honors were not present on the last occasion. *D'Emden* v. *Pedder* (*o*) was not decided on the United States cases, but on a statement of the British law as laid down by Coke. The High Court then say that they will do what the Privy Council itself has done—namely, while saying that the United States decisions are not binding, they will listen to the principles which they enunciate.

[HODGES, J. The decision of one Full Court binds all subsequent Full Courts. I am the only member of the bench who was not present on the last occasion, and I should not exercise my mind on the subject at all. I am bound by that decision.

MADDEN, C.J. To the extent to which the subject-matter in in this case differs from *Wollaston's Case* (*p*), we can deal with it, but not otherwise. As to the applicability of the United States cases, the opinions of the learned Judges in *D'Emden* v. *Pedder* (*q*) which apparently lean towards such applicability are merely *dicta*, and incomplete *dicta* at that, and we do not regard them therefore as binding upon us. We had occasion to carefully consider such applicability in *Wollaston's Case*, and have decided against it, upon the ground (*inter alia*) that the United States decisions turn upon the Constitution of the United States, which is essentially different from that of the Australian Commonwealth and other British Constitutions. The High Court seems to have been of opinion that none of the Courts in the United States have departed from the principle of *McCulloch's Case* (*r*). With every respect to the High Court I think that an examination of the United States decisions—*Dobbin's Case* (*s*) amongst them—will show that, while they enunciate the principle of *McCulloch's Case*, they undoubtedly go beyond it. On the other hand, the disposition of the later cases is to confine the doctrine to that laid down in *McCulloch's Case*: *Cf. Railroad Company* v. *Peniston* (*t*). At least until

(*o*) 1 C.L.R. 91.
(*p*) 28 V.L.R. 357.
(*q*) 1 C.L.R 91.
(*r*) 4 Wheat. 316.
(*s*) 16 Peters 435.
(*t*) [1873] 18 Wall. 5.

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the High Court says otherwise in explicit terms, we are bound by the decision of the Privy Council in *Bank of Toronto* v. *Lambe* (*u*), which, moreover, may be the ultimate Court of Appeal in this matter.]

Twice previously to that case the Privy Council declined to recognize that the principle of the United States cases did not apply: See *The Attorney-General for Quebec* v. *The Queen Insurance Company* (*v*); *The Attorney-General for Quebec* v. *Reed* (*w*). A consideration of that case shows that the principle of *McCulloch's Case* (*x*) had nothing whatever to do with the case before the Court, and that is all in effect that the Privy Council says. The remarks in that case have been wholly misapprehended. In *D'Emden* v. *Pedder* (*y*) the High Court says:—"In the case of *Bank of Toronto* v. *Lambe* (*z*), in which the case of *McCulloch* v. *Maryland* had been cited before the Judicial Committee of the Privy Council, the Committee, so far from depreciating the authority of that case, intimated their willingness to follow the guidance of the great American Chief Justice in a similar case, but pointed out that the principles laid down in *McCulloch* v. *Maryland* threw no light on the question before them. It is not easy, indeed, to discover the purpose for which *McCulloch* v. *Maryland* was there cited. We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not

(*u*) [1887] 12 App. Cas. 575, at p. 587.
(*v*) [1878] 3 A.C. 1090.
(*w*) [1884] 10 A.C. 141.
(*x*) 4 Wheat. 316.
(*y*) 1 C.L.R. 91, at p. 112.
(*z*) 12 A.C. 575.

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as an infallible guide, but as a most welcome aid and assistance. There is, indeed, another consideration which gives additional weight to the authority of the United States decisions with regard to matters in which the two Constitutions are similar. We have already, in discussing the language of sec. 51 of the Constitution, referred to the inference to be drawn from the fact that a Legislature has deliberately adopted in its legislation a form of words which has already received authorative interpretation." The case of the *Sydney Municipal Corporation* v. *Commonwealth of Australia* (*a*) shows even more strongly that the High Court are going to apply the principles of the United States cases notwithstanding the case of the *Bank of Toronto* v. *Lambe*. There it was held that the Commonwealth was not liable to pay municipal rates upon property occupied and used by it within the city of Sydney, inasmuch as the imposition of such rates was an interference by the State with the agencies and instrumentalities of the Commonwealth, and Griffith, C.J., says, at p. 232:—"If the tax is considered as merely a tax upon the Commonwealth regarded as a juristic person, or upon its officers as persons—a view which for reasons already given I think erroneous—other considerations would arise. In that view, the question for discussion would be whether a State, or a delegated authority within a State, has power to affect the Commonwealth or its officers in the performance of the duties cast upon them by the Constitution or by the laws of the Commonwealth. The answer to this question depends upon the further question whether under the Constitution of the Commonwealth the jurisdiction of the States extends to the Commonwealth regarded as a juristic person, or to its officers in the performance of their duties as such officers. On this point my opinion is sufficiently expressed in the judgment in *D'Emden* v. *Pedder*" (*b*). In that case also the High Court says that the power of veto is not enough; that even if the Crown, which in our Constitution is part of the Parliament, were to assent to an Act, and that Act were, in the working out, to be found to be in any particular opposed to the Commonwealth Constitution, it would be void.

(*a*) 1 C.L.R. 208. (*b*) 1 C.L.R. 91.

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[MADDEN, C.J. The judgment in *D'Emden* v. *Pedder* (c) seems to me to misconceive the position altogether. It says, at pp. 117, 118:—"It is, however, the duty of the Court, and not of the Executive Government, to determine the validity of an attempted exercise of legislative power. The assent of the Crown cannot, nor can the non-exercise of the power of veto, give effect to an invalid law. And it would be to impose an entirely novel duty upon the Crown's advisers if they were required, before advising whether the power of veto should be exercised, to consider the validity under the Constitution of the provisions of each Act presented for the Royal assent. That, as already said, is the function of the judiciary. And, even if such a duty were cast upon the Executive Government, it could neither relieve the judiciary of their duty of interpretation nor affect the principles to be applied in that interpretation." If an Act of Parliament comes into force, then the Court, and the Court only, can interpret it. But under its power of disallowance, as distinguished from its power to veto, the Crown may, as is shown in *Wollaston's Case*, within a period of two years after assent has been given to an Act by the Governor, and even though the Act is admittedly good law, determine that it will be disallowed.]

An Act may not come into operation until after the lapse of two years. Again, assuming that the Crown did not disallow an Act, and after a lapse of two years it was found to be unconstitutional, then surely the fact that the Crown had not disallowed it would not make it good.

[PER CURIAM. Certainly not; it would be bad *ab initio*.

MADDEN, C.J. Under the United States Constitution certain powers were given to the Federation, and everything else remained with the States. The result was that a State might have the power to enact a law which was perfectly good, but which would be apt to contravene the Federal Constitution or its principles. The United States Courts therefore decided that any enactment by the States which might have the effect of interfering with the Federal Constitution was bad. It is not with reference to bad laws (because they take care of them-

(c) 1 C.L.R. 91.

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selves, or rather the Court takes care of them), but with good laws, that the power of disallowance exists, and the Crown may disallow a perfectly good law if it be of opinion (say) that it may create disruption.]

In *D'Emden* v. *Pedder* (*d*) it was not suggested that the Tasmanian Act was unconstitutional. The decision which has invariably been arrived at in these cases is that the tax is a diminution of the salary, and therefore a tax on the salary. In a Queensland case it was held that the salary of a member of Parliament could not be garnisheed, because his salary was the equivalent of his services, and if you garnisheed his money you lessened the value of his services.

Counsel also referred to *The Collector* v. *Day* (*e*); *Leprohon* v. *The Corporation of Ottawa* (*f*); *Boyd's Constitutional Law*, p. 64; *Black's Constitutional Law* (2nd ed.), pp. 375, 378; and *The Commonwealth of Australia Constitution Act*, sec. 81.

MADDEN, C.J. (to *Isaacs, K.C.*) What do you say as to sec. 7 of the *Income Tax Act* 1895? Can the words "in so far as such income is official and not personal" apply to a "Minister of the Crown as such Minister?"

Isaacs, K.C., in reply—The words have always been held to apply to the whole of the persons and corporations named in the section. Members of Parliament are not included in the section, and their salaries are official in one sense. The Minister of Education in his corporate capacity has property vested in him, and he receives money in respect of it; and there are several cases in which the treasurer receives money in his own name. *Cf.* the *Transfer of Land Act* 1890, sec. 103, and the *Irrigation Act* 1890.

PER CURIAM. The section manifestly cannot apply to a man who has ceased to be a Minister, but is entitled to some salary. We need not trouble you further.

(*d*) 1 C.L.R. 91.
(*e*) [1870] 11 Wall. 113.
(*f*) [1878] 2 Ontario App. 522, 1 Cart. 592.

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MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., A'BECKETT and HODGES, JJ.] We think that in each of these cases the alleged taxpayer is liable to tax within the limits already expressed by us in *Wollaston's Case* (g). The tax is imposed (for the purpose of to-day) upon "income from personal exertion," which, according to the interpretation section, means "all income consisting of earnings salaries wages allowances pensions superannuation or retiring allowances or stipends earned in or derived from Victoria and all income arising or accruing from any trade carried on in Victoria." We are of opinion that the tax applies to incomes which are earned in Victoria, and so far as they are earned in Victoria, represented by the allowance, salary, or however it may be styled, of a member of the Commonwealth Parliament, and also of a Minister of the Commonwealth Government.

It has been said, first of all, that the salary of a member of the Commonwealth Parliament is not in any true sense a salary, but is a reimbursement of the necessary expenditure by him in relation to his attention to his duties as such member, whether in Victoria or wherever Parliament may be sitting. That is an indication of the purpose for which his salary is given, but nevertheless it is a concrete salary of so much *per annum* which a member earns; and, except for the expression of the reason why it is created, it is in all respects a salary. As soon as he becomes a member it is his, and according to the rate at which it is to be paid to him, he receives it monthly, quarterly, half-yearly, or yearly as the case may be, and it is then his to do what he likes with; and although, as I have said, there is a certain expression in its creation which indicates why it is given, it has all the attributes of an ordinary salary.

In the case of a Minister, it is said that his salary consists, in fact, of a sort of honorarium, which is given by the King to his Ministers out of a sum which is appropriated *in globo* for the purpose of representing the salaries of Ministers of the Crown. We think that, so far as this is concerned, it is merely a general standing appropriation in the *Commonwealth of Australia Constitution Act* to provide the Crown with

(g) 28 V.L.R. 357.

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Ministers, so that the Crown may call to its services the necessary constitutional advisers, and be able to pay them a reasonable remuneration for their services and the sacrifices they make in attending on the Governor-General to advise him, as representing the King. The mere fact that that sum is appropriated to the King for the purpose of paying his Ministers does not in any sense make it an honorarium to the Ministers. The Ministers, because the money is there provided by the *Constitution Act*, take that sum and divide it amongst themselves in this way:—The representative of the King sends for some person to call certain men together to His Majesty's Council—in other words, to form a Government—and that person may arrange to divide that sum of money between himself and the other members of the Government in any proportion that seems fit and proper. It is not in any sense distributed by the Governor-General—he has nothing whatever to do with it. We therefore think that there is not in connection with that particular salary any special feature which makes it cease to be salary or cease to be money earned in Victoria or derived from Victoria as a "salary allowance pension," or whatever it may be styled. It is in each case earned in Victoria so far as these gentlemen respectively bestow their labours in Victoria. As to that we have already pointed out in *Wollaston's Case* (*h*) that, although ordinarily salary is the whole reward for services, it may be, according to the intention of a particular Act of Parliament, distributable; and according to the intention of the Act in question here, it may be distributed according as it is earned in or derived from Victoria or elsewhere. In the cases before us, Mr. Deakin's salary is almost wholly earned in Victoria, though some of it is earned in other places; while that of Sir William Lyne is earned partly in Victoria, but chiefly in New South Wales. But as in *Wollaston's Case* (*h*), we think that in each case the salary is to be discriminated for the purpose of the tax according as it is earned in Victoria or elsewhere; and as it is earned in Victoria or elsewhere so it will be respectively liable or not liable to tax.

In addition to these two special features which were pre-

(*h*) 28 V.L.R. 357.

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sented to us in these particular cases, there was that which we have most recently discussed, and which it is said arises under sec. 7, sub-sec. (1), of the *Income Tax Act* 1895. It is suggested that as income derived or received by Ministers of the Crown as such Ministers is exempted by that sub-section from taxation, the salaries in question here were exempt; and for a moment it looked as if that might be so, because the difference is easily apparent as to the application of the last words of that sub-section, viz., "in so far as such income is official and personal" to the various classes of persons and corporations mentioned in the section. The application of those words to the various corporations who are named immediately before them is quite obvious, but when we see that "the income of Her Majesty" (now, of course, to be read "His Majesty") is also spoken of in the beginning of the sub-section, one at once asks—"How could income be received by His Majesty which is not official, and how could those words be considered to operate upon such income?" and if they did not apply to His Majesty, then it might be said that they did not apply to Ministers of the Crown as such Ministers. But the answer is that, whatever effect they may have with regard to His Majesty, the intention is that, whenever a Minister receives money as such Minister, and for the purposes of the Crown as such Minister, that money is exempt. But as soon as ever he receives the salary in connection with his office as such Minister, he does not receive it as such Minister, but he receives it as a person for his own personal use and expenditure. Therefore the words of that sub-section do not give exemption to any Minister of the Crown as to his salary, because he does not receive it as such Minister, but he receives it as a person for his own personal use and expenditure. It seems also a probable state of things that, if the decision in the case of *Municipal Corporation of Sydney* v. *Commonwealth of Australia* (*i*), which has been cited to us, goes the length it appears to go, then the words—"a Minister of the Crown as such Minister" in this Victorian Statute could not have any relation to a Minister of the Crown for the Commonwealth, because it is said in that case that the Crown in New South

(*i*) 1 C.L.R. 208.

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Wales, or the Crown in any of the other States, is a different juristic person altogether from the Crown in the Commonwealth. If that were so, then income derived or received by a Commonwealth Minister would not be in any case exempted from taxation by sec. 7 (1). But as to that it is unnecessary to give a decision.

As to the rest of this case, it comes to this:—It is said that the High Court has decided in the case of *D'Emden* v. *Pedder* (*k*) that a State stamp tax was not enforceable in relation to a receipt given by one Commonwealth officer to another Commonwealth officer in the direct administration of a Commonwealth Act, and it is also said that, in deciding that case, the High Court has indicated its preference for the decisions of the Courts of the United States, and for the principles which underlie those decisions, as the guiding light in the interpretation of the relations of the Commonwealth Constitution to the State Constitution, rather than, apparently, for the decisions of the Privy Council in England expressed in relation to similar matters. As to the actual decision in *D'Emden* v. *Pedder* (*k*), we do not differ from it in any way. We think that, if that case had been submitted to us—we say this with all deference and respect—we would have decided it in the same way. *Wollaston's Case* (*l*) shows that that very condition of things was anticipated as being a case in which the general words of a Victorian Statute might very well be, and properly should be, limited in such a fashion as that they should not impede the administration of the Commonwealth Government or any of its departments—that, although the words of a Victorian Statute might be perfectly general, and might appear at first sight to apply to the Commonwealth, yet, as it was put by my brother A'Beckett in that case, it is not to be imputed to the State Legislature that it has the intention of interfering with the Commonwealth; and therefore the general effect of the words is to be cut down to give effect to that principle. Therefore we say that our opinion in that case is quite in accord with that of the High Court in *D'Emden* v. *Pedder* (*k*). But as to the rest of the latter case, the opinions which their Honors have expressed as to the applicability of the United States

(*k*) 1 C.L.R. 91. (*l*) 28 V.L.R. 357.

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decisions are mere *dicta*, and therefore are not to be dealt with by us as though they were a decision. In addition to that, we have before us actual decisions of the Privy Council, which is at least a concurrent Court of ultimate appeal with the High Court, for our guidance in our decisions. We have already expressed in *Wollaston's Case* (*m*) our preference for the Privy Council decisions on the matter in question before us, because they appear to us, as conveyed by the language of their Lordships, to be more appropriate to the interpretation of the British Constitution, as it exists in Canada, in Victoria, and in the Commonwealth, than are the decisions of the United States Courts, and we have said so. The High Court is also a Court certainly of ulterior appeal, and it may be of ultimate appeal, as the Privy Council always is; and on this particular question it will be or will not be the Court of ultimate appeal according as it may seem fit to the High Court to give leave to appeal thereto, or to withhold such leave. But if the High Court takes a different view of this case from what we take, or of our reasons in *Wollaston's Case* (*m*), we will show it all the respect we are in duty bound to show it according as it may turn out to be the ultimate Court of Appeal, and its decision the final ascertainment of the law on the matter. That will depend on the relation of the one Court to the other. For the present we say that we find nothing in the case of *D'Emden* v. *Pedder* (*n*) to suggest that the judgment of this Court in *Wollaston's Case* (*m*) is not right, and we therefore adhere to it. We accordingly give in effect the same answer as we gave there, and say that both sums are rightly included in the respective assessments so far as they relate to the earnings of the respective taxpayers in Victoria.

Questions answered in favour of the Commissioner of Taxes.

Solicitors for the taxpayers: *George Turner & Son.*

Solicitor for the Commissioner of Taxes: *Guinness*, Crown Solicitor.

H. I. C.

(*m*) 28 V.L.R. 357. (*n*) 1 C.L.R. 91.

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Watercourse—Riparian owners—Rights of riparian owners—Obstructions in the alveus of a stream—Dam erected by riparian owner for the purpose of irrigation—Weir erected by riparian owner at bed level to prevent the erosion of the bed—Obstruction causing no appreciable damage—Right to nominal damages—Right to injunction—Right to preserve the bed of a stream from the operations of nature—Title ad medium filum fluminis—Trespass.

A dam erected by the defendant across a stream from his land and on to the lower end of the plaintiff's land obstructed the flow of the stream sufficiently to enable the defendant to irrigate his land, but it did no appreciable damage to the plaintiff:

A municipal corporation constructed an artificial channel, the effect of which was to concentrate the waters of a stream and to erode its bed. The defendant, in order to prevent this erosion spreading up stream between his land and that of the plaintiff, constructed a weir across the stream on a level with the bed, and lower down the stream than the above-mentioned dam. The weir did not obstruct the natural flow of the stream, but it arrested or retarded the erosion of the bed.

Held, that, apart from any question of trespass, both the dam and the weir were lawful, and that the plaintiff was not entitled either to nominal damages, or to an injunction for their removal and discontinuance.

If the *alveus* of a stream is being destroyed by the operations of nature, riparian proprietors may for their own benefit and protection preserve the course of the stream as it was by mending or maintaining its banks and bottom.

Quære, whether the title to the bed of a river *ad medium filum aquæ* is in riparian owners in severalty.

The rights of riparian owners discussed.

Bickett v. *Morris* ([1866] L.R. 1 H.L. (Sc.) 47) discussed.

CASE submitted for opinion of the Supreme Court.

1. This action is brought by the plaintiff against the defendant to recover damages for injuries done to her land by the defendant, who has erected certain constructions in the bed of the Lerderderg River, near Bacchus Marsh, which the plaintiff says have obstructed the flow of the river. I regard the damages as nominal, and estimate them at 1s., but the real question between the parties is one of legal rights rather than of damages.

2. The parties occupy land on opposite sides of the Lerderderg River, and the following admissions as to their respective titles have been made between the parties:—

i. That one Patrick Nagle was at the time of his death the

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owner of certain land on the west bank of what is now called the Lerderderg River.

ii. That such land meets or adjoins the said river a short distance above the wooden structure now placed in the said river.

iii. That the plaintiff is the tenant during her life and widowhood of the land.

iv. That the plaintiff has been since the death of the said Patrick Nagle, 26th March 1877, and is now the occupier of the said land.

v. That since November 1890 the defendant has been the occupier of land on the east bank of what is now called the River Lerderderg, near or contiguous to land occupied by the plaintiff on the west side thereof, and that he is also the owner of land on the said east bank.

vi. That the defendant is the occupier of land on the east bank of the said river at the point where the said wooden structure is placed in the said river.

3. The Lerderderg flows into the Werribee; formerly the Lerderderg just before its junction with the Werribee spread out over a considerable area of almost level land, and, in order to prevent the flooding of this area, the Shire Council of Bacchus March in 1874 constructed an artificial channel, which from that time carried the water past the level area into the Werribee.

4. The effect of making this channel was to concentrate the water which formerly spread over a large surface into a narrow channel, and soon afterwards the water thus concentrated began to erode the soft bed of the river, and to deepen its natural channel until high banks were gradually formed on each side of the stream.

5. The erosion thus begun gradually extended upstream, and deepened the bed of the river between the land occupied by the defendant and the plaintiff respectively.

6. In 1884 the defendant's predecessor in title or possession constructed a stone dam across the river to enable him to irrigate a portion of the land which he then held. This dam

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was subsequently destroyed by the floods from time to time, and was from time to time renewed.

7. In 1890 defendant went into occupation of his land, and he has maintained, or from time to time renewed, this dam, which extends more than half-way across the river. It obstructs the flow of the stream sufficiently to enable defendant to irrigate his land, but it does no appreciable damage to plaintiff.

8. In 1894 the defendant, in order to prevent the further erosion of the bed of the stream between his land and the plaintiff's, constructed a weir of wood and other materials across the river on a level with the bed, a few yards lower down the stream than the dam. This weir does not obstruct the natural flow of the stream, but it has arrested or retarded the erosion of the bed of the river.

[The particulars of plaintiff's demand and certain plans and photographs were made part of the case.]

The questions for the determination of the Court are:—

1st. Is the plaintiff entitled to recover nominal damages?

2nd. Is the plaintiff entitled to an injunction as claimed by her?

E. B. HAMILTON,
Judge of the County Court.

The particulars of plaintiff's demand were as follows:—

The plaintiff demands of you these damages for injuries caused to certain lands, to which the plaintiff is entitled as beneficial owner during her life and widowhood, which lands are situate near Bacchus Marsh, on and near the bank and on the bed of the Lerderderg River, and adjoining and conterminous with certain land of the defendant, and for damage sustained by the plaintiff in respect of her rights of user, enjoyment, and occupation of the said first-mentioned lands, including her rights of user and enjoyment of the waters of the said river in their natural and usual state and condition, and her riparian rights in respect of the said river, by reason of the defendant, his servants, agents, $\frac{\text{and}}{\text{or}}$ workmen having wrongfully dammed back the waters of the said river, and wrongfully interfered

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with and diverted the natural and accustomed flow and course thereof, and by his or their having wrongfully placed in, upon, and across the said river and the bed and channel thereof a certain wooden structure, stones, bags, and other materials, whereby the natural and accustomed flow and course of the said river has been and is being obstructed, diverted, and interfered with, and for trespass on the said first-mentioned lands and on the said river, 49*l*.

And for an order that the defendants, his agents, servants, or workmen shall remove the said wooden structure, stones, bags, or other materials from the bed or channel of the said river, and a perpetual injunction restraining the defendant, his agents, servants, or workmen from placing or using any further or other structure or materials in or abutting or projecting or encroaching on, across, or over the said river, or the bed or channel thereof, or otherwise so as to obstruct, divert, or interfere with the natural or accustomed flow or course of the waters of the said river, or so as to interfere with the natural or usual state or condition of the waters of the said river as such flow, course, state, or condition existed prior to or would have existed but for the said wooden structure, stones, bags, and other materials, or any of them being placed in, upon, or across the said river, or the bed or channel thereof, and from in any manner interfering with the plaintiff's said rights.

Bryant (with him *H. I. Cohen*) for the plaintiff—From the plans and photographs it is apparent that there has been an actual trespass both on the plaintiff's bank and also on that half of the *alveus* which belongs to the plaintiff. The case of *Bickett* v. *Morris* (*a*) decides that the title to the bed of a river *ad medium filum aquæ* is in riparian owners in severalty. In the case of *Lord* v. *Commissioners of Sydney* (*b*), decided at the time when Victoria was part of New South Wales, it was held that a Crown grant of land, bounded by a creek, passed half the creek to the grantee. See also *Coulson and Forbes on the Law of Waters* (2nd ed.), pp. 100–107.

(*a*) L.R. 1 H.L. (Sc.) 47. (*b*) [1859] 12 Moo. P.C. 473.

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[HOOD, J., referred to *Garibaldi Co.* v. *Craven's New Chum Co.* (*c*).]

Counsel referred to *Davis* v. *The Queen* (*d*), *Wishart* v. *Wyllie* (*e*), and *Borton* v. *Howe* (*f*).

[PER CURIAM. The case says nothing about trespass, so that we need not discuss it. The probability is that the learned Judge finds no difficulty in regard to it.]

Borton v. *Howe* (*g*) also decides that "the common law respecting the rights of riparian proprietors is applicable to the colony of New Zealand," and the *ratio decidendi* of that case, at pp. 13, 14, is equally applicable to Victoria. On this point *cf.* also *North Shore Railway* v. *Pion* (*h*). The plaintiff, as a riparian owner, "has the right to have the water come to him in its natural state, in flow, quantity, and quality, and *to go from him without obstruction*": *Chasemore* v. *Richards* (*i*). In *Bickett* v. *Morris* (*k*) there was an encroachment on the *alveus* of 2½ feet only in a stream 58 feet wide, and with a depth of not more than 2 feet where it was deepest; yet though no damage had been sustained, or was proved to be likely, the obstruction had to be removed: See per Lord Westbury, at p. 60. In the Court below Lord Benholme had said:—"What may be the result" (of putting a building in the channel of a river) "no human being with certainty knows, but it is my right to prevent you doing it; and when you do it you do me an injury, whether I can qualify damage or not;" and Lord Neaves had said:—"The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question;" and Lord Chelmsford says, at pp. 55, 56:—"These views appear to me to be perfectly sound in principle, and to be supported by authority. . . . It seems to me to be clear that neither proprietor can have any right to abridge the width of the stream or to interfere with its regular course." At pp. 58, 59 Lord Cranworth says:—"The owners of the land on the banks

(*c*) [1884] 10 V.L.R. 233.
(*d*) [1869] 6 W.W. & A'B. (Eq.) 106, at p. 115.
(*e*) [1853] 1 McQ. 389.
(*f*) [1875] 3 N.Z.C.A. 5.
(*g*) 3 N.Z.C.A. 5.
(*h*) [1889] 14 App. Cas. 612, at p. 620.
(*i*) [1859] 7 H.L.C. 349, at p. 382.
(*k*) L.R. 1 H.L. (Sc.) 47.

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are not bound to obtain, or be guided by, the opinions of engineers or other scientific persons, as to what is likely to be the consequences of any obstruction set up in waters in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say—'We all have a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure." It would be impossible to find language more directly applicable to this case, in which, as the obstructions are permanent, and extend right across the stream, there can be no question as to their unlawfulness. Of course there must be some limitation on the rule, and this is recognized by all their Lordships, and is thus stated by Lord Cranworth at p. 59:—"It was said in argument—'Then, if I put a stake in the river, am I interfering with the rights of the riparian proprietors?' To this I should answer, *de minimis non curat praetor*. But further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to anyone from the act."

That case has been consistently followed without question both in Great Britain and in the colonies. In *Norbury* v. *Kitchin* (*l*) it was held that—"A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream." In *Palmer* v. *Persse* (*m*) it was held that "the plaintiff was entitled irrespective of proof of actual damage to an injunction restraining the defendant from continuing an obstruction in *alveo fluminis*; and that "the principle of the case of *Bickett* v. *Morris* is not confined to the case of opposite riparian proprietors, but it extends to all cases where injury is likely to arise or may by reasonable possibility be sustained by riparian proprietors." That case is analogous to this also in the fact that certain alterations had been made in

(*l*) [1867] 15 L.T. N.S. 501. (*m*) [1877] 1 R. 11 Eq. 616.

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the stream by the local authorities acting under statutory powers. *Cf.* also *McGlone* v. *Smith* (*n*), and *Belfast Rope Works* v. *Boyd* (*o*). In the latter case, Chatterton, V.C., says, at p. 565:—"I think it is hard to contend that this structure is not an injury. From its very nature it is an injury to interrupt the flow of the stream by building a barrier across it." In *Pring* v. *Marina* (*p*) it was held by the New South Wales Full Court that "the erection of a dam by a riparian owner across a running stream cannot be lawful if it obstruct for one moment the flow of the entire stream to the other lands below." That Court also held in *Howell* v. *Prince* (*q*) that "where the flow of water of a running stream in its natural course is interfered with, every person injured in any degree, however unascertainable, may maintain an action for obstruction of the water without proof of actual damage;" while *Lomax* v. *Jarvis* (*r*) is another Full Court decision to the same effect. In all these cases too, as distinguished from this case, the dam or other obstruction objected to was on the defendant's own land, and at a considerable distance from the land of the plaintiff.

[PER CURIAM. The case says that the weir was "constructed by the defendant on a level with the bed in order to prevent the further erosion of the bed between his land and the plaintiff's," and that it "has arrested and retarded the erosion of the bed of the river." Is not all that perfectly lawful?]

No. Nature must be allowed to take her course. That is the rule of law, and it is also a rule of convenience, because one set of riparian proprietors may want the river deep and another set may want it shallow, and who is to decide between them? There is no reported case as to whether you can or cannot stop the erosion of the bed of a stream, but what may be called the converse case has been decided, namely, that "where by long-continued natural accretion the bed of a river, and consequently the flow of water, have become permanently altered, it is not within the rights of a riparian owner, by removing the accretion, to restore the flow of water to its former state as to velocity and direction:"

(*n*) [1888] 22 L.R. (Ir.) 559.
(*o*) [1887] 21 L.R. (Ir.) 560.
(*p*) [1866] 5 N.S.W. S.C.R. (L.) 390.
(*q*) [1869] 8 N.S.W. S.C.R. (L.) 316.
(*r*) [1885] 6 N.S.W. L.R. (L.) 237.

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Withers v. *Purchase* (s). It was admitted in argument in that case "that there must be no interference with the solid bed or the banks of the river;" and Kekewich, J., says, at p. 821—"It is impossible accurately to define the rights of a riparian owner in respect of interference with the channel of a stream. On the one hand he may, probably without complaint, erect a post for a ferry or for mooring a boat, or plant stakes to prevent poaching, though one and all would induce a slight alteration of the current; and on the other hand, it is difficult to suppose any case in which he can lawfully build a dam, say half-way across the stream, whatever its size and character. *Bickett* v. *Morris* recognizes the *de minimis* rule while establishing the principle that it is not necessary to prove that damage has been sustained or is likely to be sustained;" and at p. 822 he says:—"I can discover no sound argument against extending to the bed the principle applicable to the banks—that where a stream changes its course by slow steps the riparian proprietors are bound to accept the consequent alteration in their boundaries."

[HODGES, J. Could not a riparian owner palisade the face of his bank to protect it? and could he not remove, say, six inches of the bed and pitch it with stones to an exactly similar depth in order to protect the bed from erosion?]

It has been laid down in *Bickett* v. *Morris* (t) that riparian owners on the banks of a non-tidal river may protect their property from the invasion of the water by building a bulwark *ripæ muniendæ causâ*; but that even in this necessary defence of themselves they are not at liberty to conduct their operations so as to do actual injury to the property on the opposite side of the river or above or below them. Lord Chelmsford, L.C., says, at p. 56, that "being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences upon the principle of *sic utere tuo ut alienum non lædas*. But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore, the act being *primâ facie* an encroachment, the *onus* seems properly to be cast upon the party doing it to show that it is not an injurious obstruction."

(s) [1889] 60 L.T. N.S. 819. (t) L.R. 1 H.L. (Sc.) 47.

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In the same case in the Court below, Inglis, L.C.J., said:—"The general rule unquestionably is that even for the defence of his property a riparian owner has no legal right to make any erection *in alveo*:" See 14 L.T. N.S. 835, at p. 836. All he has is the right to raise the banks, so long as he does not injure the property of others: See *Coulson and Forbes on the Law of Waters* (2nd ed.), pp. 154–157, and the cases there cited. The language of the law is "*aqua currit et debet currere ut currere solebat*;" and it is laid down in *Bracton*, iii., c. 45, that a person cannot lawfully "divert the water or do anything or immerse anything whereby the water flows in a lower or higher or a thinner or more rapid stream than before, or whereby it is diminished in any way, whereby it changes the bed of the stream to work inconvenience to a neighbour."

[HODGES, J. Supposing a flood were to deposit a huge tree opposite a man's land, could he not remove it?]

Probably he could, though if the tree had grown in the bed, he could not interfere with it. The true principle as to this point is derivable by analogy from the cases on the question of accretion. That principle is, that where the operations of nature are sudden and perceptible, then persons affected thereby are not bound to accept their consequences. Where, for example, a stream suddenly alters its course, they may restore it to its old course; and in any case their property remains as before, according to the former bounds: *Ford* v. *Lacy* (*u*). But where the operations of nature are gradual and imperceptible, no person has any right at any time to intervene, or to interfere with such operations. As it is put by *Angell on Watercourses* (7th ed.), p. 49 (*n.*):—"Each owner takes the chances of injury and of benefit arising from the situation of the property." In *Foster* v. *Wright* (*v*), Lindley, J., in delivering the judgment of the Court, says:—"The question we have to determine is, whether the plaintiff's exclusive right to fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property. I am of opinion that it does. The change of the bed of the river has been gradual; and, although the river bed is not now where it was,

(*u*) [1861] 7 H. & N. 151. (*v*) [1878] 4 C.P.D. 438, at pp. 446, 447.

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the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. . . . Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough* (*w*); and, conversely, land gradually encroached upon by water ceases to belong to the former owner: *In re Hill & Selby Railway Co.* (*x*) The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shows this to be the case." *Cf.* also *Coulson and Forbes on the Law of Waters* (2nd ed.), pp. 70, 71, 101, 102; *Hindson* v. *Ashby* (*y*); and *Zetland* v. *Glover Incorporation* (*z*).

Even though the learned Judge has found that the damages are nominal, there is no finding whatever with regard to apprehension of damage, which must be obvious in the case of obstructions like these. But apart altogether from actual damage, there being an interference with the plaintiff's right, there is an actionable wrong, and she is at the very best entitled to a verdict for nominal damages, and also to the injunction claimed, because, if the interference be allowed to continue, the defendant, who, moreover, claims to do what he has done as of right, might obtain an indefeasible right by acquiescence or prescription: See *Gale on Easements* (7th ed.), pp. 244-246; *Harrop* v. *Hirst* (*a*); *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (*b*); and *Embrey* v. *Owen* (*c*), which holds that "whenever an injury is done to a right, actual perceptible damage is not indispensable as a foundation to an action, but it is sufficient to show the violation of a right, and the law will presume damage." Even though the damages be nominal, an injunction is granted to prevent the inconvenience of repeated actions for damage: See *Pennington* v. *Brinsop* (*d*);

(*w*) [1874] 3 B. & C. 91; 5 Bing. 163; 27 R.R. 292.
(*x*) [1841] 5 M. & W. 327.
(*y*) [1896] 2 Ch. 1.
(*z*) [1870] L.R. 2 H.L. (Sc.) 70.
(*a*) [1868] L.R. 4 Ex 43.
(*b*) [1875] L.R. 7 H.L. 697, at p. 705.
(*c*) [1851] 6 Exchequ. 353.
(*d*) [1877] 5 Ch. D. 769.

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and *Clowes* v. *Staffordshire Water Co.* (*e*); while *Fullwood* v. *Fullwood* (*f*) also shows that where a legal right is established, an injunction in aid of it follows as of course.

Duffy, K.C. (with him *Miller*) for the defendant—The learned Judge has found that the dam "does no appreciable damage to the plaintiff," using the word "appreciable" in the sense defined by the case of *Embrey* v. *Owen* (*g*) as "incapable of being estimated or valued." In the case of *Menzies* v. *Breadalbane* (*h*), Lord Lyndhurst, L.C., referring to the facts of the unreported case of *Farquharson* v. *Farquharson*, decided in 1741, says:—"The river had been continually going to the eastward. It had in one instance actually departed from its original course, and taken a new direction, placing a part of Invercauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation by a new encroachment on Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, I apprehend is a most material distinction in cases of this kind." In this view the weir erected by the defendant is perfectly lawful. The weir, in fact, is as much a benefit to the plaintiff as it is to the defendant. All that *Bickett* v. *Morris* (*i*) decides is that if it is established that an obstruction *in alveo* interferes with the flow of the stream, so as to throw more water on to the bank of the *adversarius*, then it is not necessary for him to show that damage has happened. As appears from the report of that case in 14 L.T. N.S. 835, at p. 836, Inglis, L.C.J., in his judgment in the Court below, said:—"If it could be shown that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—*in emulationem vicini*—not under any apprehension of danger to himself, or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line, if it could be shown

(*e*) [1872] L.R. 8 Ch. 125, at pp. 142, 143.
(*f*) [1878] 9 Ch. 176.
(*g*) 6 Ex. 353.
(*h*) [1828] 3 Bli. (N.S.) 414, at p. 421.
(*i*) L.R. 1 H.L. (Sc.) 47.

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that the work had been accidentally extended into the *alveus*, that it was *innocuæ utilitatis*, or that it was beneficial to the complainer as well as the respondent, I am not prepared to say that I could hold such a work to be illegal." The true limits of that case are shown by the case of *Orr-Ewing* v. *Colquhoun* (*k*). Lord Blackburn, in his judgment, at p. 855, cites with approval a passage from the judgment of the Privy Council in *Miner* v. *Gilmour* (*l*), which says:—"But, further, every riparian owner has the right to what may be deemed the extraordinary use of the water flowing past his land, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." That passage is also approved of in the case of *Baily* v. *Clark* (*m*). In this case the learned Judge has expressly negatived "sensible injury." Lord Blackburn then, at p. 856, expresses his disagreement with the view of the Lord President and the Court below to the effect that an erection *in alveo* of a running stream, though in a man's own land, is *primâ facie* illegal, even if it does not alter the flow of the water on anyone else's land, or interfere with the rights of other proprietors either above or below him; and then he goes on to say—"I apprehend that a proprietor may without any illegality build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont; and without asking the leave of the proprietors below him if he takes care to restore the water to its natural course before it enters their land. It would require strong authorities to lead me to believe that the law of Scotland does give the proprietors on the banks of the stream a right to act the part of the dog in

(*k*) [1877] 2 App. Cas. 839. (*l*) [1858] 12 Moo. P.C. 131, at p. 156.
(*m*) [1902] 1 Ch. 649.

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the manger to such an extent as to hinder this." No damage or injury to a proprietary right being shown, Lord Blackburn concluded that an injunction should not be granted.

[*Cohen*—There is here, as there was in *Bickett* v. *Morris* (*n*), an injury to a proprietary right, while in that case the alleged interference was with a right of navigation, which is simply a right of way, and not a proprietary right.]

In *Bickett* v. *Morris* (*n*) the defendant built part of a house into a stream, which, of course, he had no right to do. In the case of *Belfast Rope Works* v. *Boyd* (*o*), FitzGibbon, L.J., says—"It was contended that under *Bickett* v. *Morris* all that need be shown was an erection *in alveo fluminis*, and that the moment that was shown the burden of proof was thrown upon the defendants, and the erection and continuance of the weir became illegal, unless the defendants could prove not only the absence, but the impossibility, of injury to the plaintiffs. I cannot think that, according to the ordinary law of this country, such a burden of proof is thrown upon every riparian owner who builds a weir in a flowing stream. It would be impossible to sustain it in almost any case, and scarcely a weir erected in the United Kingdom could have originally escaped condemnation as an unlawful structure if this be the law. Every erection *in alveo fluminis* must to some extent interfere with the flow of the stream, and every mill-weir is in fact erected for the purpose and has the effect of altering and delaying the natural flow, and may be so used, and generally is so used, as sensibly to affect that flow below it. . . . It could not be proved that they were incapable of causing serious injury to lower proprietors." He then cites the passage from *Miner* v. *Gilmour* (*p*), already referred to, and continues:—"If that passage be law a riparian proprietor who erects a mill-wheel has the right to maintain it, not only if it cannot inflict, but if it has not inflicted, any sensible injury on other proprietors—at least, unless such injury is probable or has been threatened."

Bryant in reply—The only discussion that has ever arisen in

(*n*) L.R. 1 H.L. (Sc.) 47.
(*o*) 21 L.R. (Ir.) 560, at pp. 578, 579, 580.
(*p*) 12 Moo. P.C. 131, at p. 156.

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regard to *Bickett* v. *Morris* (*q*) is as to whether it allows *all* the riparian proprietors to complain of an obstruction in a stream, but its application in the case of adjacent or *ex adverso* proprietors has never been questioned. In *Orr-Ewing* v. *Colquhoun* (*r*) Lord Blackburn throughout his judgment expresses his approval of it, so far at least as it applies to such owners, in unmistakable terms, and at p. 853 he says:—"I understand the principle of *Bickett* v. *Morris* to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage, and I think the same principle will apply where the complaining party is not a proprietor, *ex adverso*, of the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection *in alveo* alters the natural flow of the water on the complaining party's land." The passage in the judgment of FitzGibbon, L.J., in *Belfast Rope Works* v. *Boyd* (*s*) immediately succeeding that relied on by the defendant is:—"I do not think that *Bickett* v. *Morris* was intended to hold that the mere possibility of injury is sufficient to make every or any erection *in alveo fluminis* illegal—at least in any other case than that of an *ex adverso* or immediately adjacent proprietor." Even with that limitation it completely covers this case. The quotation from *Miner* v. *Gilmour* (*t*) is not at all at variance with the decision in *Bickett* v. *Morris*, and moreover the words "dam up the stream for the purpose of a mill" do not necessarily mean the building of a dam right across the stream. A dam built obliquely may, and usually does, serve all the purposes of a mill. Further, the expression "sensible injury," as used in that quotation and throughout the cases, means sensible "*injuria*," or infringement of legal right, as distinct from "*damnum*." If the defendant were injured as a result of the cut made by the

(*q*) L.R. 1 H.L. (Sc.) 47.
(*r*) 2 App. Cas. 839.
(*s*) 21 L.R. (Ir.) 560, at p. 580.
(*t*) 12 Moo. P.C. 131, at p. 156.

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Shire Council in 1874, he could have obtained compensation from the council, both for actual and prospective damages: See *Local Government Act* 1874, secs. 384, 387, and *President, etc., of Colac* v. *Summerfield* (*u*). The plaintiff has a right to protest against the alteration caused by the weir in the natural action of the stream, whether it be for better or worse: *Cf. Roberts* v. *Gwyrfai District Council* (*v*). If once a riparian owner were permitted to interfere with the bed of a stream on the ground that his interference was merely for preservative or restorative purposes, he might operate upon just so much of the bed as might satisfy his purpose or caprice, and might thereby cause great injury to other riparian proprietors. Endless disputes would arise; and for this reason the law says to all alike—"You must not touch the bed or channel. Let Nature take her course."

Counsel also referred to *Attorney-General* v. *Lonsdale* (*w*); and *Lemmon* v. *Webb* (*x*).

MADDEN, C.J., delivered the judgment of the Court [MADDEN C.J., HODGES and HOOD, JJ.] This is a very important case, not because it presents to the Court anything that is new, or revolutionary of the law, as we have always understood it, but because a claim is put forward which in itself is very startling as to its effects. The contention put to us is that where there is a stream with riparian owners upon either bank, it is a principle of law that no riparian owner can touch in any way whatever the *alveus* of the stream for any purpose. If that were the law, and every riparian owner has to be considered in his individual opinion as to what is best to happen in the use of the stream, so that none may do what any one of them forbids or differs from, the result of that proposition carried to legitimate lengths would be, in a country like this, in many parts of which water is often very scarce and extremely valuable, this—that the riparian owner who is nearest in opinion to savagery would prevail, and the stream would never be used for its true purposes. That is,

(*u*) [1893] A.C. 187.
(*v*) [1899] 1 Ch. 583; 2 Ch. 608.
(*w*) [1868] L.R. 7 Eq. 377.
(*x*) [1895] A.C. 1.

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the good and proper use of the stream for the best purposes for which it could be used would be absolutely forbidden; and the country would remain unprogressive, although everyone except the one person objecting aimed in the same direction. If but one forbade it, the water could not be used for the best purposes of utility. It is therefore necessary in this case to re-state the law, because that is all that needs to be done, and in order to do that it is necessary to do once again what appears to have been already done—namely, to call attention to the fact that there are two entirely different propositions involved in the matter of a watercourse. There is the stream of water running along certain depressions or between certain enclosures of land; and there is the *alveus*. It must be remembered that the one is water, and the other is land. It is also well, and indeed necessary, to remember that the two things—the *alveus* and the stream—stand upon quite different principles of law. So far as the *alveus* is concerned, we may say for to-day, though we do not decide it, that in this country, as it certainly is in England, the *alveus* is a piece of land covered by water, which belongs to each of the proprietors of the land on either side up to the middle line. That is unquestionably the law in England. It may be the law in Victoria—we do not decide it to-day, because we are not asked to decide it. We avoid saying anything about it. In this case, so far as the argument is concerned, it has been assumed that the law in Victoria is the same as it is in England. The matter is merely a question of real property up to that point.

The stream of water itself is another thing. Every riparian owner, as to that, has these rights. Each riparian owner may, as of course, use the water, and each has this right—that if he needs it for himself and his stock, and can do it, he may consume the whole of the water that comes to him. This is an absolute right—each of them is entitled to take all he wants for his domestic use and for his stock. Of course, if the water gives out, it gives out for every one of the riparian owners, but so long as it remains, it remains for everybody who is a riparian owner. But in addition to that there is what is called the "extraordinary user" of the water, and that means this—

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that every riparian owner has also the right to use the water from the stream for any purpose that he desires, and in any quantity that he chooses, provided always that he does not by that user sensibly diminish the quantity of the water for other riparian proprietors, and also subject to this, that in his attempt to use it for extraordinary purposes (using the phrase in the sense in which it has been used before), he does not either obstruct the water sensibly as against the man above him, or diminish the water sensibly as against the man below him.

Now these two features are things to be distinctly remembered in order to properly understand the cases as they have been decided. The rule, then, that ensues in respect of both these principles—that relating to the *alveus* and that relating to the water—is this, that, subject to the ordinary law of trespass, any riparian owner may utilize the *alveus* in order to exercise his extraordinary rights of using the water of the stream, provided he does not sensibly decrease its volume, or sensibly obstruct it as against any other riparian owner. As far as the *alveus* itself is concerned, it is subject to just the law of trespass. If the riparian owner on this side of the stream owns the land on that side of the stream, and therefore owns the *alveus* from side to side, he may, if he likes, put a dam across the whole of the *alveus* in order to exercise his extraordinary right of user of the water, provided always that his doing so does not, as I said before, sensibly diminish, divert, or obstruct the stream of water as against other riparian owners. If he does not own both sides of the stream, but owns only one side, and can, and does, obtain the consent of the other man on the opposite side of the stream, he can do the same thing; or having regard to the ordinary limitations which appertain to the law of trespass, he may do it too, but he cannot, of course, trespass on that which is the land of another without his consent or without any of those other excuses which the law allows when the question of trespass arises in relation to land.

Those principles of law are made perfectly clear as it appears to us from the cases which have been cited to us. The case of *Bickett* v. *Morris* (*y*) discusses the question apparently somewhat

(*y*) L.R. 1 H.L. (Sc.) 47.

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at large, and as a result the actual decision of the Court is in places not as clear as it is made in subsequent cases. But in his judgment Lord Chelmsford, as Lord Chancellor, at pp. 55, 56, seems to put the matter within limitations which cannot be mistaken. He says:—"These views" (speaking of the views of the Scotch Judges in the Court below) "appear to me to be perfectly sound in principle and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis* neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. My noble and learned friend, the late Lord Chancellor, during the argument, put this question: 'If a riparian proprietor has a right to build upon the stream, how far can this right be supposed to extend? Certainly (he added) not *ad medium filum*, for, if so, the opposite proprietor must have a legal right to build to the same extent from his side.' It seems to me to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course; but anything done *in alveo*, which produces no sensible effect upon the stream, is allowable." He goes on to say later on:—"Upon principle, then, the respondents had a cause of action in respect of the Defender's building, and were entitled to a declaration against the encroachment, and a decree to have the obstruction removed. The authorities cited in the argument at the bar support the principle, and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripæ muniendæ causâ*, but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river. In this case mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences upon the principle of *sic utere tuo ut alienum non lædas*. But any operation extending into the

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stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore, the act being *primâ facie* an encroachment, the *onus* seems properly to be cast upon the party doing it to show that it is not an injurious obstruction." The result, therefore, is that His Lordship lays it down that anything done *in alveo* that produces no sensible effect upon the stream is allowable. The expression "sensible effect upon the stream" must be rationally interpreted, because if you dip your finger in the water you produce a sensible effect upon the water in one sense. But His Lordship is referring there to the word "sensible" as applied generally to the water of a stream—that you must not diminish it sensibly. You may take ten million gallons of water out of it, and that would be an enormous abstraction; but yet, of course, you may do it if you do not sensibly diminish the volume for other people's use. In the same way you may obstruct the stream, provided you do not sensibly divert it or throw it back upon the man above. As it has been in effect put by Lord Blackburn in another case:—'You may place *in alveo* an obstruction which may have the effect of diverting a large portion of the stream into your own riparian land for your own riparian purposes, provided you let the stream go on the other side to pursue its course in its old line of flow. No matter what quantity you divert or use for the time being so long as you do not sensibly diminish it for the man below—you may obstruct, always provided that in doing so you do not effect or produce any injury on the man opposite." That word "sensible" must be sensibly remembered in reading all these cases. It does not mean any even considerable interference with the stream, provided that interference does not amount to a breach of the rule of law which I have already stated. Then his Lordship goes on, in effect, to say that "every interference is *primâ facie* an encroachment." That is true; and if there be an interference—it may be little or it may be much—it is *primâ facie* an encroachment, and therefore he says that the *onus* is always on the man who thus interferes to show that it does not sensibly diminish the flow, or obstruct the flow, or divert the flow; and if he does that, it necessarily follows logically from that proposition as stated that if a man does show

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that the flow is not sensibly diminished, or sensibly obstructed, or sensibly diverted, then he has discharged that *onus*, and he has satisfied the law that he has done nothing which he is not entitled to do.

That case is followed by the case of *Orr-Ewing* v. *Colquhoun* (*z*). Therein Lord Blackburn, as indeed is his wont, puts the matter as clearly as language can put it. He gathers together the apparent differences in the various Courts of the realm, and, having so brought them together, he discusses *Bickett* v. *Morris* (*a*) amongst other cases. He limits its extravagance, if it be lawful to say so, or the excursion from the direct line which their Lordships were considering, and he brings the decision to its precise ratio, and he then discusses it in his own vigorous fashion at p. 854—"My Lords, as the *ratio decidendi* of *Bickett* v. *Morris* (*a*) is unquestionably binding, I shall proceed to support my view of that decision by argument and authority, and I think it the more necessary to do so as the Lord President, who as Lord Justice-Clerk was a party to that decision, seems now to take a different view of the effect of that decision from that which I take. My Lords, where the property in the banks of the natural stream, above the flow of the tide, is in different persons, *primâ facie*, and until the contrary is shown, the boundary between their properties is the *medium filum aquæ*. In this respect there is no difference between the law of England and Scotland. And, after some diversity of opinion, it has, I think, been for many years the settled law of England that the proprietor of land on the bank of such a river has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the water. This can hardly be considered as settled law in England before the case of *Mason* v. *Hill* (*b*). He goes on to point out that from 1625 it had been the law in Scotland, and says:—"Precisely the same law has been now established in America (*Blanchard*

(*z*) 2 App. Cas. 839.
(*a*) L.R. 1 H.L. (Sc.) 47.
(*b*) [1833] 5 B. & Ad. 1.

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v. *Miller* (c)) and in England (*Mason* v. *Hill*) without, I think, either the American or English judges being aware that the Scotch judges had so long before anticipated their reasoning. This right is subject to the use of the water by those above him, below him, and opposite to him, either acquired by user, or such as the general law gives to the riparian proprietors." After referring to *Embrey* v. *Owen* (d), he continues:—"In *Miner* v. *Gilmour* (e) Lord Kingsdown, in delivering the judgment of the Privy Council, says:—'It did not appear that for the purpose of this case any material distinction exists between the French and the English law. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.'" Then the judgment in several other places, which I will not now cite, discusses the other authorities, and Lord Blackburn puts the thing precisely as I have, though much more effectually than I have, endeavoured to re-state it here.

It has then to be remembered that every part of the water belongs to either riparian owner, but that the *alveus*—that is, any part of it which is immediately opposite a given proprietor or proprietors—belongs to that proprietor or those proprietors. It is very important also to remember that every riparian proprietor may go and take the water wherever he finds it, and

(c) 8 Greenleaf Amer. Rep. 268. (d) 6 Ex. 353, 367.
(e) [1858] 12 Moo. P.C. 156.

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for this purpose may go up the stream or down the stream, or wherever the water is, along the particular land of which he is the proprietor. As far as the *alveus* is concerned, neither of them can make any excursion on to other parts of it beyond the *medium filum fluminis.* In the present case we have to apply those principles, and as far as we are concerned it is exceedingly easily done. The case states that there is a dam, which is described in the case, upstream relatively to a weir. As to that dam, the finding for our judgment is this:—"It obstructs the flow of the stream sufficiently to enable defendant to irrigate his land, but it does no appreciable damage to plaintiff." The result is that, as far as we are concerned to-day, there is an erection *in alveo* which does obstruct the stream, but not so as to sensibly obstruct the flow of the water as against the people who are above or to sensibly diminish it as against those below. The result is, therefore, applying the principles above stated, that the obstruction in that case is a lawful obstruction, and the defendant has shown that, though he has placed it *in alveo,* he has done it legitimately, because he has not sensibly diminished, obstructed, or diverted the stream within the proper meaning of the word "sensibly."

There is also a weir, the history of which is somewhat different. It appears that the dam was erected in 1884, and was washed away from time to time, and was from time to time mended or re-erected. It remains there at the present day. It was sometimes strengthened by a mound of bags being placed upon it. That is its history, and the true principles of law, when applied to the particular findings of the Judge, in our opinion, dispose of the matter. As to the weir, it appears to us that there was an alteration made in the stream by a cut which the municipal corporation made, and the effect was that the water used to undercut the bottom of the stream—the *alveus*—and with the effect, which always happens where the soil is alluvial, that when the stream became very small the water simply dribbled over the edge of each inequality in the bed and undercut them, leaving a ledge of earth; and then, when a great body of water came along, its weight and rush broke down

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that piece, and a considerable amount of earth was washed away. Then the same process went on again and again. In order to stop that, this weir, a wooden building, was erected by the defendant for the purpose of making a face that would not be eroded, and the effect of it was to stop the erosion which it had been put there to prevent. The weir itself was so placed that it is found that it was "on a level with the bed." The result was therefore that it was no obstruction above the bed—the *alveus*—and, in that point of view, could not be any breach of the law relating to water-courses. We take it, as the result of the cases which I have mentioned and of the other cases cited in them, that every riparian proprietor has the right to make erections, as it is put, *ripæ muniendæ causâ*—for the purpose of repairing or maintaining his bank—and he certainly can so mend or maintain his banks. It seems, however, probable, though it is unnecessary to deal with that here to-day, that he has the right to mend the bottom so as to maintain the bottom in good order and condition, provided he does not sensibly raise or lower that bottom. It is found by the learned Judge that the weir was constructed on a level with the bed, and his finding then goes on to say:—"This weir does not obstruct the natural flow of the stream, but it has arrested or retarded the erosion of the bed of the river." We think that, as it does not obstruct the natural flow of the stream, according to all the authorities it is not a breach of the law. He has done that which is both useful and legitimate in order to preserve the river in the state in which it then was—operating for the advantage of all the parties, and not interfering with the rights of any of them.

There were a number of cases cited to us which it is right to refer to in order to show that they are not pertinent to the matters involved here. They are cases which decide that where the original and natural course of a stream has been altered by any natural cause so that a new flow—a new stream, different altogether to the old stream—has been formed, then a person who would have been a riparian owner on the banks of the old stream must not interfere with the stream as it has become in order to bring it

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back to its old course, or do anything which has that effect. The result is that where the banks of a stream have tumbled in, or by reason of obstructions which have been long allowed to remain in the bed of the river, the course has been lost in whole or in part and a new course is being pursued by the stream, then a person who would have been entitled to the ownership of the bank or banks of the old course must not do anything to restore the stream from its new course to its old course; because, as it has been put, these are the operations of nature, and as nature has altered the stream so all the world must take it. But if the *alveus* is being destroyed by the operations of nature, riparian proprietors may, for their own benefit and protection, preserve the course as it was by mending or maintaining the banks and the bottom. The case of *Menzies* v. *Breadalbane* (*f*), and *Farquharson* v. *Farquharson*, cited in it at p. 421, make that absolutely clear, and, as I have said, that is also the judgment of the Court in *Orr-Ewing* v. *Colquhoun* (*g*). We therefore think that these questions which are put to us ought to be answered—(1) "Is the plaintiff entitled to recover nominal damages?" "No; apart altogether from the question of trespass." We desire to let it be thoroughly understood that we do not deal with the question of trespass, as the materials are not before us. The learned Judge has stated this case seeking to extract from us our opinion as to the question of interference with the water flow as contradistinguished from interference with the *alveus* as mere land or with the bank. We do not say anything as to the question of trespass, because we do not think this case is ripe for decision on that point. But subject to any view which the learned Judge may take as to any interference with the *alveus* or the bank, apart from trespass, the plaintiff is not entitled to recover nominal damages.

As to the second question—"Is the plaintiff entitled to an injunction as claimed by her?"—we answer (confining our attention to any interference with the water) "No."

The question of the costs of this matter rests also with us by the Statute. On that subject there is also a little difficulty. We see that it may be that the learned Judge may yet conclude

(*f*) 3 Bli. (N.S.) 414. (*g*) 2 App. Cas. 839.

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that on the question of trespass the plaintiff is entitled to succeed. We express no decision as to that. It may be that the ultimate judgment in the action may be for the plaintiff, and if that be so, then questions as to fairness might arise on the question of costs. But the plaintiff has brought this action, and this particular case stated is one of the incidents of this action. The defendant has been brought here to fight this case stated, and therefore it would be unfair to deprive him of the costs of it when he has been successful. Therefore we think that the proper order to make as to costs is that the costs of this case stated be the defendant's costs in the cause. The result will be the ordinary one, that if he succeeds and gets judgment finally in the action with costs then he gets all the costs of the action; but if he fails, and judgment is given against him with costs, the plaintiff will get the costs of the action, but not the costs of this case stated.

Questions answered in favour of the defendant.

Solicitors for the plaintiff: *Dugdale & Creber.*
Solicitors for the defendant: *Moule, Hamilton & Kiddle.*

H. I. C.

TURNER *v.* MANGAN.

HOOD, J.
1904
May 27, June 2.

Police Offences Act 1890 (*No.* 1126), *s.* 41 (12)—*Place of public resort.*

A pathway leading up to and forming part of railway station premises adjoining the ticket office, along which numbers of people passed, and on the fence of which stock notices were posted for the information of the public, is "a place of public resort" within the meaning of sec. 41, sub-sec. (xii.), of the *Police Offences Act* 1890.

CASE STATED by the Court of General Sessions at Melbourne.

John Turner was charged under the *Police Offences Act* 1890 (No. 1126), sec. 41 (xii.), with that, "being a suspected person, he did on 11th July 1903 then and there frequent a certain place of public resort, to wit the Newmarket railway station, there situate, the same being at the time a place of public resort, with intent to commit a felony." The evidence was that the

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accused was seen, not on the platform, but only on the ramp: that notices relating to live stock were ordinarily posted on the ramp, and that people went there every day to look at them: that the ticket window was outside the platform and at the top of the ramp.

The accused was convicted, and his conviction was affirmed by the Court of General Sessions.

A case was stated as to whether—

(*a.*) Certain evidence was admissible at the stage at which it was given.

(*b.*) Whether the facts in evidence did or did not constitute the pathway leading up to the wicket gate of the railway station platform, and outside the platform, a "place of public resort."

Eagleson, for the accused, cited:—*McWilliams* v. *The Justices of Melbourne* (*a*); *Davidson* v. *Darlington* (*b*).

Wanliss, for the Crown, cited:—*Re Jones* (*c*); *Reg.* v. *Wellard* (*d*).

Cur. adv. vult.

HOOD, J., read the following judgment:—As to the first question herein, counsel for the defendant has stated that it does not raise the objection which he took. With that I have nothing to do; I can only deal with the point stated, and as it stands there is nothing in it.

As to the second question, I think that there were facts in evidence to show that the pathway referred to was a place of public resort when the defendant was there. It is part of the station premises adjoining the ticket office. People were resorting there in numbers, and it was a place where stock notices were posted which persons went to read. If the facts in *Davidson* v. *Darlington* (*e*) are looked into, they show that that decision really governs the present case. (I wish to say, in respect to the first point decided there, that in the case of *R.* v.

(*a*) [1896] 18 A.L.T. 78.
(*b*) [1899] 24 V.L.R. 667.
(*c*) [1852] 7 Ex. 586.
(*d*) [1884] 14 Q.B.D. 63.
(*e*) 24 V.L.R. 667.

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Sturt (*f*), though there were three summonses, there was only the one and the same charge for a joint offence, and therefore that decision did not apply to the facts of *R.* v. *Muir* (*g*).) The decision in *McWilliams* v. *Justices of Melbourne* (*h*), which was relied upon, does not seem to me to apply. The Court there held that the mere fact that the public used a street *qua* street did not make it a place of public resort. That cannot mean, as was contended, that the use of a place by the public in the manner in which the place was intended to be used would prevent it from being a place of public resort. Such an interpretation would exclude all places which are expressly intended for public resort, such as theatres and gardens, and which have been held to be within the section. Nor has the permanency of the use anything to do with the matter. "The object of the provision is the protection of large assemblies of persons from the depredations of thieves and pickpockets, and the permanent character of the assembly appears to me to be quite immaterial:" *Sewell* v. *Taylor* (*i*).

I therefore answer the questions by saying that neither of the contentions is correct.

Attorney for the Crown: *Guinness*, Crown Solicitor.
Attorney for the accused: *L. S. Lazarus.*

W. H. M.

In re PYNE; *Ex parte* THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED.

HOOD, J.
1904
May 19.

Probate Charges Act 1903 (*No.* 1827), *s.* 2—*Solicitor's charges for obtaining probate —"Property left"—Gross or net value—Costs of preparing statement—What are included in.*

For the purpose of determining the charges to be allowed under the *Probate Charges Act* 1903 to a solicitor for obtaining probate the gross value of the estate is to be looked at.

The costs of "preparing statement," which may be charged for separately, include the costs of instructions for statement and of the affidavit verifying the statement.

(*f*) [1876] 2 V.L.R. 103.
(*g*) [1896] 2 A.L.R. (C.N.) 322.
(*h*) [1896] 2 A.L.R. 202.
(*i*) [1860] 7 C.B. (N.S.), at p. 164.

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HOOD, J.

1904

Re PYNE; *Ex parte* THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED.

SUMMONS TO REVIEW TAXATION.

The solicitor's bill of costs for obtaining probate of the will of William Symons, deceased, of which the Perpetual Executors and Trustees Association were executors, contained the following items :—

Statutory costs of obtaining probate, estate valued at 4114*l.* (gross)	13*l.* 10*s.* 0*d.*
Instructions for statement, including attendances on valuers, the executors, and others	3*l.* 3*s.* 0*d.*
Instructions for affidavit verifying statement	0*l.* 6*s.* 8*d.*

The net value of the estate was less than 4000*l.* The taxing officer reduced the first item to 13*l.*, which was the allowance provided by the *Probate Charges Act* 1903 for an estate where the property left was more than 3500*l.*, and not more than 4000*l.*

The taxing officer also disallowed the second and third items, on the ground that they were not part of the costs of "preparing statement," which the Act allows the solicitor in addition to the fixed charge. A summons was thereupon taken out to review the taxing officer's decision.

Paul in support referred to the *Administration and Probate Act* 1890, sec. 29; "Rules of Supreme Court," App. N.; and the *Probate Charges Act* 1903 (No. 1827), sec. 2.

HOOD, J. I think the taxing officer is wrong on all three points. At first, taking sec. 2 (*a*) by itself, the words "property left" rather inclined me to the view that the sub-section was dealing with the amount actually received by the beneficiaries; but passing to sub-section (*b*), relating to letters of administration, the gross amount of property seems to be what is intended as the basis for arriving at a ready system of fixing costs in small estates. If the gross amount does not exceed the amount which is there mentioned, the costs are not to exceed the sum fixed. As to the other items, I see no possible reason why the cost of "preparing and passing" the statement should be extra to

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the fixed sum if it is only filling up the document that is intended. The Legislature recognized that there may be some extra work which the solicitor would have to do, and which would cause him a fair amount of trouble. It would be a ridiculous view to take that the solicitor should be allowed specially for engrossing and filling up the document, and yet be allowed nothing for getting the information for it. The objections will be referred back to the taxing officer.

Solicitors for the applicant: *Hughes & Permezel.*

J. M.

[IN CHAMBERS.]

HOLROYD, J.

1904.

January 6.

In re KING.

In re KING; KING *v.* BERNDT.

Will—Construction—Trustee—Direction to sell realty—Duty—Power to postpone sale or to lease—Practice—Originating summons—Infant—Representation.

A testator declared that upon the happening of certain events his trustees should with all convenient speed absolutely sell and dispose of his real estate or such part thereof as should be then unsold.

Held, that although the words "with all convenient speed" gave the trustees a certain discretion to postpone the sale, if in doing so their conduct was afterwards challenged by any beneficiary it would lie upon them to show that the interests of such beneficiary had not been injured by the delay.

Held also, that in such a case the trustees ought, as far as possible, to keep their discretion open and unfettered.

Upon a summons asking the Court to determine, in the interests of infants beneficiaries, whether something should be done or forborne, the infants should be brought before the Court personally.

The National Trustees Executors and Agency Co. Ltd. v. *Johnson* ([1892] 18 V.L.R. 386) distinguished.

ORIGINATING SUMMONS.

Robert King, by his will dated 9th August 1883, appointed his wife, Agnes King, and his daughter, Anne Jane King, trustees and executors thereof, and, after making certain bequests of personal estate, devised all his real estate to his trustees upon trust to receive the rents and profits, and (after payment of interest in respect of any mortgage thereon) to pay thereout to his daughter Anne Jane an annuity of 100*l.* during her life, and to pay the residue to his wife during her life provided she should so long continue his widow, and upon the death or marriage of his wife upon trust to pay the rents, issues,

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In re KING.

and profits (after payment of interest) to his said daughter during her life for her separate use. The will contained a proviso that the trustees, in their absolute discretion, at any time, for the purpose of satisfying and paying off any mortgages on testator's real estate, or for the purpose of paying his debts, funeral and testamentary expenses, might absolutely sell or dispose of any part of the real estate, and have power to grant leases of all or any part of such real estate, for any term not exceeding five years, at the best rent that could reasonably be obtained therefor. Upon the death or marriage again of his wife, and upon the death of his said daughter, the testator declared that the trustees for the time being of his will should, with all convenient speed, absolutely sell and dispose of his said real estate, or such part thereof as should be then unsold, and should stand possessed of the moneys to arise from such sale or sales upon trust for all the children or any the child of his said daughter Anne Jane and all his other children in equal shares and proportions, and if there should be only one of the above-mentioned persons, the whole for such one, and he declared that, in the event of the death of either his last-mentioned children leaving lawful issue, such issue should take the share to which his or their parent would have been entitled if he, she, or they had lived. There was no provision for the appointment of new trustees contained in the will.

Robert King, the testator, died 1st October 1883. Probate was granted to Agnes King, his widow, and daughter, Anne Jane. Both of these persons were now dead, the widow not having married again, and the daughter dying unmarried. Of several other children who survived the testator one died before her interest under the will became vested, leaving children, some of whom were infants, all resident outside the jurisdiction.

James Leslie King and William Girvin King, two of testator's children, issued a summons asking—(1) an order for the appointment of new trustees of the will, (2) an order sanctioning the postponement by such new trustees of the sale of the real estate for a period not exceeding six years as they or the survivor of them or other the trustees or trustee for the time being of the will in their or his discretion might think fit, (3) an order that

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such trustee or trustees might from time to time during such postponement of sale be at liberty to grant leases of the real estate, and (4) so far as might be necessary administration by the Court. Matilda Berndt, one of the testator's children, resident within the jurisdiction, was made defendant on behalf of all the beneficiaries except the plaintiffs. All the beneficiaries, adult and within the jurisdiction, desired that the plaintiffs should be appointed trustees. Since the deaths of Agnes and Mary Jane King several unsuccessful attempts had been made by the adult beneficiaries to sell the real estate.

A. J. Agg for the plaintiffs—The orders sanctioning postponement of sale by the trustees and for power during such postponement to grant leases of the real estate are for the benefit of the infant beneficiaries.

Counsel referred to *National Trustees Executors and Agency Co. Ltd.* v. *Johnson* (a); *Fox* v. *Dolby* (b); *McLelland* v. *Howell* (c); *Umphelby* v. *Grey* (d).

L. S. Woolf for the defendant.

Cur. adv. vult.

HOLROYD, J., read the following judgment:—I am prepared to make an order appointing the plaintiffs new trustees of the will of Robert King, deceased, but not the other orders asked for. The testator declared that upon the death or remarriage of his wife and upon the death of his daughter Anne Jane, which events have happened, the trustees for the time being of his will should with all convenient speed absolutely sell and dispose of his real estate or such part thereof as should be then unsold. If under such a clause the trustees would have no power to postpone the sale of the testator's real estate, I have no jurisdiction to confer such a power upon them. I think that by the words "with all convenient speed," a certain discretion is confided to them as to postponing the sale, if it is manifest, or they have good grounds for believing, that a postponement would prevent the property from being sacrificed; but, if their conduct in so doing were

(a) 18 V.L.R. 386.
(b) [1883] W.N. 29.
(c) [1896] 24 V.L.R. p. 985 (n.)
(d) [1898] 24 V.L.R. 979.

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HOLROYD, J.

1904

In re KING.

afterwards challenged by the beneficiaries or any of them, it would lie upon the trustees to show that the interests of such beneficiaries had not been injuriously affected by the delay: *Cuff* v. *Hall* (*e*). They ought moreover as far as possible to keep their discretion open, and not to put it for a definite period out of their power to sell, although an opportunity of selling at a fair price should offer. The trustees can protect themselves against adult *cestuis que trustent* as regards the consequences of any step they may take to which the latter have consented; and so far the intervention of the Court is not necessary. But if the Court is asked to determine that it would be for the advantage of infants that something should be done or foreborne, the infants should be brought before the Court personally, and have an opportunity of submitting their rights and interests to the Court. They are not sufficiently represented by an adult beneficiary who has already made up her mind as to her own interest. Perhaps in the case of the *National Trustees Executors and Agency Company Limited* v. *Johnson* (*f*) I went a little too far. But the order there sought was very different; the infants were before the Court, and put in the usual defence; and the adults were all in favour of the order being made. Such of the adult beneficiaries under Robert King's will as Mrs. Berndt has been selected by the plaintiffs to represent, but have not in fact consented to what is proposed, would not, in my opinion be, or at any rate ought not to be, deprived by any order of the Court of their right to hold the trustees responsible for the consequences, if they could show the postponement of the sale to have been rash and unreasonable, as well as disastrous to the estate.

Taxed costs of the parties to come out of the estate; plaintiff's costs to be taxed as between solicitor and client.

Solicitor for plaintiff: *Donahoo.*

Solicitor for defendant: *Champion.*

R. H. C.

(*e*) 1 Jur. N.S. 972. (*f*) 18 V.L.R. 386.

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In re WARD-COLE, *an Insolvent.*

F.C.

1903
October 12.

Insolvency—Assignment in trust for benefit of creditors—Trustee's commission—Costs of trustee—Sequestration of assignor's estate—Right of trustee under deed of assignment to deduct from moneys in his hands belonging to insolvent estate—Costs of preparing insolvent's schedule—Rights of assignee in insolvency to money in hands of trustee under deed of assignment—Insolvency Act 1890 (*No.* 1102), *s.* 71.

The rights to the payment of commission properly chargeable, and of costs and expenses properly incurred, by trustees under a deed of assignment for the benefit of creditors are preserved by sec. 71 of the *Insolvency Act* 1890, and the trustees are entitled, notwithstanding the sequestration of the assignor's estate, to deduct and retain moneys for the payment thereof from the moneys in their hands as such trustees at the date of the sequestration.

The costs incurred in the preparation and filing of an insolvent's schedule may be allowed out of the insolvent estate.

The assignee or trustee in insolvency has no power to take possession of money in the bank to the credit of the trustees under a deed of assignment for the benefit of creditors made prior to the sequestration of the insolvent estate.

Semble, that the Judge of the Insolvency Court has a discretion to allow the payment out of the insolvent estate of any remuneration or expenses not provided for by the *Insolvency Acts.*

APPEAL.

On the 27th February 1902 Margaret Morison Ward-Cole made an assignment by deed of all her estate to A. S. Baillieu and C. B. Norton for the benefit of all her creditors. By order *nisi*, dated 7th April 1902, and made absolute on the 1st May 1902, the estate of Miss Ward-Cole was compulsorily sequestrated. Prior to the sequestration, Messrs. Baillieu and Norton were entitled to receive the sum of 54*l.* 2*s.* 9*d.*, being the balance of commission properly chargeable by them under the provisions of the deed of assignment. On the 30th April 1902 a cheque was given by Messrs. Baillieu & Norton to Messrs. Fink, Best & Hall for the sum of 19*l.* 14*s.* 5*d.* for legal costs, charges, and expenses properly incurred by them as such trustees under the provisions of the deed of assignment. On the 2nd May 1902, E. N. Brown, the assignee of the insolvent estate of Miss Ward-Cole, with the permission of the bank, took possession of the whole of the money in the bank to the credit of Messrs. Baillieu and Norton as such trustees, and the cheque for 19*l.* 4*s.* 5*d.* abovementioned was consequently not paid. On the 15th May 1902 W. G. Sharp was appointed trustee of the insolvent estate, and

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subsequently paid the said sums of 54*l.* 2*s.* 9*d.* and 19*l.* 14*s.* 5*d.* to Messrs. Baillieu & Norton and Messrs. Fink, Best & Hall respectively, and a further sum of 14*l.* 6*s.* 1*d.* to Messrs. Fink, Best & Hall for "costs of preparation and filing of insolvent's schedule." Both these bills of costs had been taxed and allowed by the Chief Clerk at the respective sums mentioned prior to payment. Upon the filing of his accounts by the trustee in insolvency, each of the said sums of 54*l.* 2*s.* 9*d.*, 19*l.* 4*s.* 5*d.*, and 14*l.* 6*s.* 1*d.* was surcharged by the official accountant, the two first-mentioned sums on the ground that "the trustees for commission and the solicitors for costs could only rank as ordinary creditors," and the last-mentioned sum on the ground that "in the absence of an order of the Court there does not appear to be any authority for paying costs incurred by insolvent in preparing her schedule." The trustee in insolvency objected to the surcharge, and the official accountant made a report in writing to the Judge of the Court of Insolvency at Melbourne, and on 26th June 1903 an order was made calling upon the trustee in insolvency to "show cause why he should not refund to the insolvent estate the sum of 88*l.* 3*s.* 3*d.*" (the sum total of the three sums above mentioned), "being the amount of the surcharge mentioned in the said report of the official accountant," and on the 15th July 1903 an order was made for the refund by the trustee in insolvency to the insolvent estate of the said sum of 83*l.* 3*s.* 3*d.*, with costs.

The reasons of the learned Judge for making this last-mentioned order are fully set out in the judgment of Holroyd, J. (*infra*). From this order the trustee in insolvency now appealed.

Isaacs, K.C. (with him *Cussen* and *Wanliss*), for the appellant—The trustees' commission and the legal charges properly incurred under the deed of assignment are perfectly *bonâ-fide* dealings, and are clearly protected by sec. 71 of the *Insolvency Act* 1890, which avoids the assignment as against the trustee in insolvency, but leaves unaffected by sequestration "all dealings with the property" assigned, and "all acts and things *bonâ-fide* made or done by the trustees" under the

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assignment. Sec. 71 merely says that the creditors shall not have the property by virtue of the assignment, but must get title in some other way. In other words, it merely kills the trust. Further, sec. 74 (3) provides that "nothing in this Act shall render invalid any contract or dealing with any insolvent made in good faith or for valuable consideration before the date of the order of sequestration." So far as the deed of assignment operates as a transfer in trust for the creditors the law revokes it, but the agency of the persons called upon to do the necessary work under such deed is left untouched. That is not part of the assignment. Where either a voluntary or a compulsory sequestration is made, the costs of the sequestration incurred by the insolvent and the petitioning creditor respectively are to be paid out of the estate: See secs. 34 and 40. Clearly, therefore, the costs of the preparation and filing of the insolvent's schedule should be paid out of the estate. Sec. 27 of the *Insolvency Act* 1897 is a safeguard against any unnecessary and unreasonable expenditure, and, the Chief Clerk having allowed both bills of costs, they should be paid out of the estate.

Counsel also referred to sec. 70 of the *Insolvency Act* 1897 and to rule 151 of the "Insolvency Rules 1898."

Mann for the official accountant, respondent—By sec. 71, upon the sequestration of an estate a deed of assignment is avoided altogether, except as to rights of property acquired for value and without notice. The saving words in the section are for the purpose of saving *bonâ-fide* holders for value of property acquired for the trustees from being liable to actions for conversion. Even if the trustees under the deed had paid themselves their commission after having notice that sequestration proceedings were pending, then that section would have avoided such payment as against the trustee in insolvency. Neither the claim for commission nor the first bill of costs was for anything "made or done by the trustees" within the meaning of sec. 71. In *Smith* v. *Dresser* (*a*) it was held that, a conveyance in trust for creditors being invalid, the trustee thereunder was not entitled to retain the costs and expenses incurred by him in the

(*a*) [1866] L.R. 1 Eq. 651.

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execution thereof: *Cf. In re Holden, Ex parte Official Receiver* (b). As to the distinction between acts which are acts of insolvency, and acts which are void but are not acts of insolvency, see *In re Vansittart, Ex parte Brown* (c). As to the second bill of costs, the trustee in insolvency has paid of his own motion costs which should have been paid by the insolvent herself, and the learned Judge meant by his decision merely to intimate that the trustee was wrong in paying such costs without the authority of the Court.

Counsel also referred to *Insolvency Act* 1890, secs. 123 and 128, and "Insolvency Rules 1898," rules 153 and 171.

Isaacs was not called upon to reply.

HOLROYD, J., delivered the judgment of the Court [HOLROYD, A'BECKETT, and HODGES, JJ.] The official accountant who audited the accounts of the trustee in this insolvency surcharged him with three several sums of money which the accountant conceived had not been properly paid. The trustee informed the official accountant that he intended to dispute the surcharges, and thereupon the accountant applied to the Court, and the Court made its order calling upon the trustee to show cause why these sums should not be surcharged.

Now, what happened was (shortly) this: Messrs. Baillieu & Norton, who had been the trustees of a deed of assignment executed by Miss Ward-Cole, had under that deed sold a portion of her property, had collected certain of her assets, and had also incurred certain expenses in the administration of the trusts. Under the terms of the deed they were to be allowed for expenses of the nature of those they had incurred, and were also to be allowed commission on the sales and on the collection of the assets. Before the insolvency the amount of commission to which they had become entitled was a sum of 54*l.* 2*s.* 9*d.*, and the costs which they had incurred, and to which they were entitled under the deed, amounted to the sum of 19*l.* 4*s.* 5*d.*; and there was money to their credit in the bank as trustees under the deed of assignment. On the insolvency the assignee

(c) [1893] 2 Q.B. 379. (b) [1887] 20 Q.B.D. 43.

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took upon himself to "attach," as he expressed it, the money standing to the credit of Messrs. Baillieu & Norton in the bank. I am unable to see myself what authority the assignee could have had to take possession of this money, and I do not understand why the bank permitted him. There was a debt due by the bank to Messrs. Baillieu & Norton as trustees of the deed of assignment. Upon the insolvency the deed of assignment became void. But, at the same time, the rights which Messrs. Baillieu & Norton had to be paid for commission and for the expenses legitimately incurred under that deed were preserved by the proviso at the end of sec. 71 of the *Insolvency Act* 1890. Therefore the trustees under the deed of assignment might have paid themselves the commission and costs if the money had not been seized by the assignee.

When the trustee in insolvency was appointed, he considered his position with regard to these two sums, and also with regard to a third sum. As to the first two sums, he came to the conclusion that the insolvent estate was not entitled to either of them. The money was not ear-marked. There might have been a debt due from the trustees under the deed to the trustee in insolvency, but in ascertaining the value of that debt the trustees under the deed were entitled to deduct what was due to them by virtue of sec. 71. The trustee in insolvency had nothing to do as an honest man but to pay back that money and put the trustees under the deed in the same position as if the money had not been seized. As to the first two items, I think, therefore, that the surcharge was improper.

As to the third item, that stands in a different position. This was a sum of money which had been paid to the solicitors, Messrs. Fink, Best & Hall, for preparing and filing the insolvent's schedule. I do not know how or by what authority the instructions were originally given to Messrs. Fink, Best & Hall for that purpose. Looking at the bill of costs itself the principal item in it states—"Numerous and lengthy attendances upon insolvent, conferring and taking instructions to prepare schedule—her estate having been compulsorily sequestrated." It is said in the evidence that Mr. McCay, who was Mr. Sharp's accoun-

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tant, and who had really given the instructions, had incurred the items in this bill of costs some days before Mr. Sharp was appointed trustee in the estate. However, under sec. 27 (3) of the *Insolvency Act* 1897, it is the duty of the Chief Clerk, when he is taxing the bills of costs and charges which are presented to him, to satisfy himself before passing such bills of costs and charges that the employment of a barrister and solicitor in respect of the particular matters out of which the charges arise was reasonable and necessary. We must assume, therefore, that the Chief Clerk did satisfy himself, when this bill of costs of Messrs. Fink, Best & Hall was before him, that both the employment of Messrs. Fink, Best & Hall for the purpose for which they were employed and the charges which they made were in his opinion reasonable and necessary. We think it was the duty of the official accountant, as regards all these various matters, to call the attention of the Judge to them. The Judge had made no order about them, and the Judge apparently had a discretion as to remuneration which was not provided for. The attention of the Court having been drawn to the surcharges, as I have said, the matter came before the learned Judge, and he allowed all these surcharges. What he says is this:—"My reasons for making the order herein were that I held generally that the official accountant was right." Now, what does the official accountant say? That is to be found in exhibit 7, and it is addressed to Mr. Sharp. He says:—"In reply to yours of the 15th inst., I beg to inform you that my reasons for making the surcharge are—(1), as to 19*l*. 14*s*. 5*d*. and 54*l*. 2*s*. 9*d*., that the solicitors for the costs and the trustees for commission can only rank as ordinary creditors; (2), as to 14*l*. 6*s*. 1*d*., in the absence of an order of the Court there does not appear to be any authority for paying costs incurred by insolvent in preparing her schedule." On that the learned Judge says:—"I held generally that the official accountant was right. In my opinion the payments of 54*l*. 2*s*. 9*d*. and 19*l*. 14*s*. 5*d*. were not protected by sec. 71 of the *Insolvency Act* 1890. I was also of opinion that the money attached on the 2nd May 1902 was all part of the insolvent estate."

From what I have already said, it would appear that the

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Court is of opinion that the learned Judge was wrong, that the two sums of 54*l.* 2*s.* 9*d.* and 19*l.* 14*s.* 5*d.* were protected by sec. 71, and that the money attached on the 2nd May 1902 was not part of the insolvent estate.

Then the learned Judge proceeded in this way:—"I did not think that the trustees under the deed had a lien on the money attached in the English, Scottish, and Australian Bank." I hardly know myself what is meant by that. The position which the trustees under the deed took up was this:—"This is our money. We are trustees for it, with the right to make certain deductions before accounting for the balance of the trust."

Then the learned Judge says:—"I did not think that the trustees under the deed had a claim as having a right of indemnity as against the trustee in insolvency. Nor did I think that the trustees could claim on the arguments as to mutual credits and mutual dealings based on sec. 121 of the *Insolvency Act* 1890." We do not think it necessary to discuss these two reasons. The trustee in insolvency, as we have already stated, restored the condition of things which had existed before the money was improperly attached.

With regard to the 14*l.* 6*s.* 1*d.*, the learned Judge appears to have thought that he had no discretion in the matter. He says "such costs were not chargeable to the estate in the case of a compulsory sequestration." The inference from that appears to be that in his opinion such costs could never in any event be allowed—that the insolvent (whether he had money or whether he had none, or whether he had the ability to file his schedule or whether he had not) should always be obliged to file his schedule himself and pay for it. It is to be presumed that the Chief Clerk allowed this amount, being satisfied that it was requisite for the benefit of the estate and for the purpose of carrying out the insolvency proceedings that the items should be allowed; and when the matter came before the learned Judge, so far as this item was concerned, it was virtually an appeal from the Chief Clerk's decision. We think, on those grounds, that on all points the learned Judge was in error, and that this

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appeal should be allowed with costs, and the order of the 10th July 1903 set aside, with costs.

Appeal allowed, with costs.

Solicitors for the appellant: *Fink, Best & Hall.*
Solicitor for the respondent: *Guinness*, Crown Solicitor.

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Banker and customer—Cheque, fraudulent alteration of—Negligence of customer in filling up cheque.

A cheque was drawn by one of three executors in such a way as to permit of the spaces left in the cheque being filled up. The cheque in this form was signed by all the executors, and the executor who had thus drawn the cheque subsequently filled in the spaces with letters and figures for a far larger sum than the amount of the cheque as presented to the other two executors for their signature, and the banker paid the same, and the first executor misappropriated the amount representing the altered cheque.

In an action by the other two executors to recover the extra amount of the cheque thus fraudulently altered,

Held, that the plaintiffs could not recover.

Per HODGES, J. That the contract between a banker and his customer is, that while the banker undertakes to honour the cheques of his customer, the latter on his part undertakes that he will not, by the method of drawing such cheques, give facilities for their alteration, or that the customer undertakes that if the banker is misled by his fault in the manner of filling up the cheques the loss shall fall upon the customer.

Per HOOD, J. The customer of a bank undertakes that he will not draw his cheques in such an unusual way as to afford facilities for fraud, and if he does so he must bear the loss.

Young v. *Grote* ([1827] 4 Bing. 253) followed.

APPEAL.

This was an appeal to the Full Court from a verdict given in the action, and a motion for a new trial.

The action was brought by W. L. Marshall and H. J. Day against the Colonial Bank of Australasia Ltd., claiming the sum of 450*l*. The facts proved at the trial showed that the plaintiffs, together with one R. Myers, were the executors of Ann Myers,

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and as such executors kept a banking account with the defendant bank. A sum of money belonging to the estate had been paid into the bank, upon which the plaintiffs were accustomed to draw. The cheques were signed by all three executors. It appeared that on several occasions R. Myers, one of the executors, drew cheques in such a form as to leave considerable space in the line for the letters in the cheque, and a sufficient space to fill in figures in the figure-line. The other two executors signed the cheques in this form—the cheques being open cheques—and handed them to their co-executor Myers, who filled in the spaces with letters and figures for a far larger amount than the cheques when presented for signature represented, and cashed the cheques, and misappropriated the balance represented by the fraudulent alteration. The defendant set up the following defence:—"If the cheques were fraudulently altered and increased in amount, such cheques were drawn by the plaintiffs and Myers without reasonable care or precaution, and in a manner and form so negligent that they enabled and permitted the alterations and erasures to be made, and the bank paid such cheques so altered in good faith, and without knowledge of any alteration, and without negligence. It will contend that the plaintiffs by reason of the aforesaid facts are estopped from alleging that the cheques so altered and increased were not their cheques, or drawn by them, or with their authority, and from alleging that the said cheques were in fact fraudulently altered and increased in amount."

The action came on for trial before Madden, C.J., and a jury of six. The cheques in question were put in evidence. The letters in these cheques as presented to the plaintiffs for their signatures commenced in the middle of the line, and there was sufficient space left in the line for the figures to be filled in. Many other cheques were put in evidence, signed by the three executors, all of which properly commenced at the edge of the line, and no spaces were left which could be filled in. The ledger-keeper called by the defendants stated in cross-examination that if his attention had been called to some of the cheques he would not have passed them, but that "the hurry of business prevents careful scrutiny of the body of the cheques."

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The first question left to the jury was—"Were the cheques or any of them drawn by the plaintiffs negligently?"

The Chief Justice, in his charge to the jury on this question, said:—"I will proceed to tell you what I refer to there. If a customer of a bank is drawing a cheque upon that bank, it appears, according to our law (as I think it still exists), that the customer is bound to avoid such negligence in drawing out his cheque as will unreasonably expose the banker to the risk of having to pay more than the proper amount of the cheque which was drawn out by such customer—that is to say, nobody is bound to suppose that anybody else will be a criminal, nor that anybody into whose hands the instrument will come will commit a forgery upon it. . . . But if you draw a cheque in a manner which a jury thinks is so negligent that it induced or caused opportunity to a person who chances to be desirous of committing a forgery to effect that forgery, so that the banker is exposed to the paying of a larger sum than you (the customer) intended when you signed the cheque, then the law is that if a jury is of opinion that such action of the customer amounts to negligence, and negligence of such a kind as in the opinion of the jury ought to preclude him from complaining of the fact that the banker paid the altered cheque, then the customer cannot complain against the bank. In other words, if a man signs a cheque or draws it out in any way he likes and nothing comes of it, no more is said; but if a man draws a cheque in such a fashion that a jury says:—'Well, now, that is a temptation to anybody who might be minded to commit a forgery. It is true nobody ought to be suspected of intending to commit it, but people do commit forgeries, and if it is a temptation to a man to commit it, and it gives him an ample opportunity to do so, then we say that the cheque so drawn ought to be considered as estopping the man who drew it from trying to make the bank liable for a forgery which has been committed, because he himself has in effect conduced to it.'"

The other questions material to this report put to the jury were:—"3. If you answer No. 1 in the affirmative, then could the bank by the exercise of ordinary care and caution have avoided paying the cheques so altered? 4. Were the cheques

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altered and increased by Myers with the knowledge and authority of the plaintiffs?"

The jury answered the first question (previously set out) in the affirmative, the third question in the negative, and the fourth question in the negative, and generally found a verdict for the defendant.

The plaintiffs now appealed from this judgment, and alternatively moved for a new trial.

Starke (*Coldham* with him) for the appellants—The Chief Justice was wrong in charging the jury that the plaintiffs were under a duty to draw their cheques in such a way that opportunities for fraud were not afforded. The general principle is that if a banker pays a forged or altered cheque he must bear the loss: *Hall* v. *Fuller* (*a*); *Robarts* v. *Tucker* (*b*); *The Instruments Act* 1890, secs. 25 and 65. The supposed duty which is sought to be placed upon the plaintiffs is founded upon the decision in *Young* v. *Grote* (*c*). The grounds of that decision must be either that the customer was estopped by his negligence, or that the customer, by affixing his signature to a blank cheque, gave, *primâ facie*, authority to fill it up. But the plaintiffs are not estopped; they made no representation of fact to the defendant, and no act of theirs misled the defendant. Estoppel must be founded upon the breach of some duty on the part of the plaintiffs. No duty is imposed by the English law upon the plaintiffs to guard against fraud: *Scholfield* v. *Londesborough* (*d*); *Canada Bank* v. *Hamilton* (*e*); *Union Bank* v. *Mersey Dock* (*f*). These cases overrule *Young* v. *Grote*, and the basis of all possible grounds for that decision is destroyed by the various judgments. Analogous cases show that the principle contended for by the defendants in this case is unsound, because there is no duty imposed by law upon persons to keep their documents or seals in such a manner that opportunities for fraud are not afforded: *Northern Counties* v. *Whipp* (*g*); *Bank of Ireland* v. *Evans Trustees* (*h*);

(*a*) [1826] 5 B. & C. 750.
(*b*) [1851] 16 Q.B. 560.
(*c*) 4 Bing. 253.
(*d*) [1894] 2 Q.B. 660; [1895] 1 Q.B. 536; [1896] A.C. 514.
(*e*) [1903] A.C. 49.
(*f*) [1899] 2 Q.B. 205.
(*g*) [1884] 26 Ch. D., at pp. 493, 494.
(*h*) [1855] 5 H.L.C. 389.

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Merchants of the Staple v. *The Bank of England* (*i*); *Arnold* v. *Cheque Bank* (*k*). There is no duty imposed upon the makers of a promissory note to draw such instrument in such a manner that opportunities for fraud are not afforded, and no difference exists in point of principle between those cases and the present: the effect of negligence would be the same in each instance so far as third persons are concerned. The law will not imply a contract on the part of the customer as regards the banker involving the duty now contended for. Such a contract is not pleaded, and it was not left to the jury as a fact. The charge was based upon estoppel, and not upon any supposed contract. What contract can be implied? Is it a duty to take reasonable care and skill in drawing cheques, or a duty to draw them in such a manner that facilities for fraud are not given? Such a duty was not suggested in *Young* v. *Grote*, or in any case commenting upon or explaining that case. In the case of *Bank of Australasia* v. *Erwin* (*l*), which must be considered as overruled by *Scholfield* v. *Londesborough*, it was laid down by this Court that *Young* v. *Grote* rested upon the principle of estoppel, and not upon any contract peculiar to banker and customer. That view of the case must now be disregarded. To what extent does this supposed duty go? Is a customer bound to consider the defects of his own handwriting, the kind of paper on which he draws his cheque, and the ink which he uses, and the fraudulent ingenuity which can be brought to bear at a particular time and place for the alteration of cheques. Moreover, the supposed duty has this absurd result, that against the frauds of a skilled forger the banker would be unprotected, while against the frauds of a clumsy forger he would be protected, and if the duty is pushed beyond the exercise of reasonable care and skill, is it reasonable to suppose that the customer made any such agreement? No definition or limitation of the duty can be found in any decided case, or upon any principle known to the law of England. Assuming that *Young* v. *Grote* was founded upon the principle that the customer by affixing his signature to a blank cheque gave,

(*i*) [1888] 21 Q.B.D. 160. (*k*) [1876] 1 C.P.D. 578.
(*l*) [1864] 1 W.W. & A'B. (L.) 70.

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primâ facie, an autherity to fill it up, it is plain that the present case is not touched by the decision. The plaintiffs did not sign blank cheques, they signed cheques for an amount specified on the face of the document, and it would be unreasonable and opposed to the *Instruments Act* 1890, sec. 21, in such a case to draw any such inference: See Lord Watson in *Scholfield's Case* (*m*). Assuming that the plaintiffs owed some duty to the defendant in the manner of drawing their cheques, there was no evidence proper to be submitted to the jury that the plaintiffs were guilty of any neglect of that duty: See the judgments of Esher, M.R., and Rigby, L.J., and of the Lords, particularly that of Lord Macnaghten in *Scholfield* v. *Londesborough*. Assuming both a duty on the part of the plaintiffs towards the defendant and a neglect of that duty, the proximate cause of the loss was not the neglect of the duty, or, in other words, the forgery of Myers, the third executor, was not the natural or probable consequence of the plaintiffs' neglect of that duty: *Baxendale* v. *Bennett* (*n*). The finding of the jury that the bank could not by the exercise of ordinary care and caution have avoided paying the cheques as altered is against evidence. The finding rests simply upon an inspection of the cheques, and the Court is in as good a position for dealing with the matter as the jury itself.

Bryant and *Schutt* for the respondent were not called upon.

A'BECKETT, J. This is a motion for a new trial in an action in which the defendant bank was sued for having improperly paid certain cheques. The plaintiffs were two out of three executors, and the cheques in question were signed by the three executors, but the two plaintiffs had those cheques handed to them for their signature filled up by the third executor in a certain form wherein blanks were left between the letters and the figures —that is, a considerable distance was left from the margin in such a way as would attract the attention of most people as being most unusual. These cheques, too, were differently filled up from numerous other cheques which were given and paid

(*m*) [1896] A.C., at p. 536. (*n*) [1878] 3 Q.B.D. 525.

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for the right amounts, and which had been duly presented to the two plaintiffs for their signatures. So without a doubt their suspicion as to these present cheques should have been aroused. The defendant says that it is not liable to repay the amounts of these cheques by reason of the negligence of the plaintiffs in signing such cheques in such a form. The Chief Justice, in charging the jury, asked them to say whether the cheques or any of them were drawn by the plaintiffs negligently.

The Chief Justice also put it to the jury to ascertain whether the bank itself was guilty of negligence through its officers in not observing the suspicious appearance of the cheques; in fact, asking the jury to find whether there had been contributory negligence. That branch of the case was put very favourably for the plaintiffs, and the jury were warned against excusing the defendant for negligence because it might have arisen from the hurry of business. The charge to the jury is not questioned on any matter except as to the legal bearing of the questions which the Chief Justice put, and the case depends upon whether those questions should govern the rights of the parties. It is not suggested that there was any aspect of the case not duly presented to the jury, and the jury found in favour of the defendant bank on all the points, and, as a consequence of their finding, judgment was given for the defendant.

In opening the appeal counsel referred to the case of *Young* v. *Grote*, upon which the Chief Justice founded his view of the law, and the contention has been that *Young* v. *Grote* is not law, and should not govern the present case. It was argued that by reason of the observations which have been made upon the case of *Young* v. *Grote* in the House of Lords, although it was not expressly overruled, yet the opinions of the members of the Court cut away all the grounds upon which it could be supported, and that therefore it is bad law. Supposing, however, *Young* v. *Grote* to be good law, I think there is no question that it would govern the present case—that is, that the view of the law upon which the Chief Justice charged the jury was the correct view, and the questions put to the jury were the correct questions.

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In that case the cheque upon which the action was brought, or upon which the point of law arose, was handed by the drawer to his wife in blank to be filled up, and she did, by the clerk who acted under her directions, fill up the cheque, but in such a way as to leave a blank space, and that space was filled up with an amount which transformed the cheque into a cheque for a larger amount, contrary to her intention. I do not think that that case can turn upon its having been a blank cheque; the authority to fill up the blank made the wife the agent of the drawer, and the act of the agent was just the same as the act of the drawer himself. It appears from the judgment that it was considered just the same as if he had himself filled it in; that, apart from the way in which it was filled up, the leaving of a blank was an improper act—that is, it was an act carelessly done, which justified the bank in paying it, and prevented the plaintiff from recovering. Best, C.J., commented strongly upon the negligence of the plaintiff, and I think that negligence is one of the grounds of the decision, without any reference to the rule laid down by Pothier, which has been said not to furnish any reason for the decision; but the case was put upon the ground of negligence, and the negligence is exactly of the same class as in the present case. Counsel argued that there can be no negligence unless there was a duty, and that there was no legal principle which created the duty. I think, however, that *Young* v. *Grote*, in deciding that there was negligence, impliedly contemplates the existence of a duty. That case has been followed in other cases as to cheques, and I think that according to the cases the law acted upon since 1827 has shown in the most practical way what will be the result of negligence of this description. It may be that it does not purport to define in a scientific way the character of the duty imposed upon the customer, but it is easily understood as a duty on the part of the customer towards his banker to avoid giving facilities for fraud in drawing instruments of this kind, and if through the neglect of the observance of ordinary caution, the instrument is changed, he is responsible for that alteration, and the bank is not to lose through his negligence. I think that that principle is perfectly intelligible, and should apply to the relation between banker and customer. It is a

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principle which ordinary common-sense can apprehend, and I think that the case of *Young* v. *Grote*, followed as it has been by other cases, has defined sufficiently, and in accordance with all reason, the obligations which attach to a person who draws a cheque—if he wishes that it should represent only such a sum as he intends to order payment of when he draws it and signs it. It is unnecessary to refer to the undesirable consequences that would follow if we held that there was no duty such as has been heretofore recognized as attaching to a customer dealing with his banker. The reason why counsel for the plaintiffs seeks to set the matter at large is because there are expressions in the case of *Londesborough* v. *Scholfield* which undoubtedly question and express disapproval of some of the reasons given in support of the judgment in *Young* v. *Grote*. I think, however, that if the learned Judges had intended to overrule that case it was their duty, and it would have been in accordance with their custom, to say so distinctly. On the other hand, it must be noticed that they say nothing of the sort, and one of their Lordships expressly points out that the case of *Young* v. *Grote* stands on a basis of its own, and is not to be considered as shaken by the decision before them; he did not use those exact words, but he did use equivalent expressions. Speaking for myself, that is sufficient for me. I find *Young* v. *Grote* as a decision still standing, not overruled, and not stated to be bad law by those whose duty it was to say it was bad law if they so considered it. I therefore consider *Young* v. *Grote* as still law, and that it governs this case, and therefore the appeal should be dismissed and the motion for new trial refused, with costs.

HODGES, J. I also think that the appeal should be dismissed. The appellant relies upon the decision in *Scholfield* v. *Londesborough*, while the respondent relies upon the case of *Young* v. *Grote*. The case of *Young* v. *Grote* in its facts is very similar to the present case; it is a case between customer and banker just as this is, and it applies strictly to the case now before us. In *Scholfield* v. *Londesborough* the case arose between an acceptor of a bill of exchange and the indorsee. The relation between acceptor and indorsee is not at all the same as the rela-

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tion of a customer towards his banker. It has been urged that the case of *Scholfield* v. *Londesborough* has really overruled the decision in *Young* v. *Grote*, but in my opinion Lords Watson, Shand, Macnaghten, and Davey expressly decline to overrule that decision. The reasons for the decision are much commented upon, and some of them violently attacked, but I do not find any one of their Lordships prepared to overrule it or to clearly say that it is bad law. It may be difficult—in fact, it is difficult—under those circumstances to say on what ground *Young* v. *Grote* ought to have been decided, or to define accurately upon what ground this case should be decided, but it appears to me that the relation of banker and customer is one of contract; a contract with the terms but sparsely expressed when the customer opens his account. The contract, however, is well known to merchants and bankers, and in my opinion there are two sides to that contract, and while on the one hand the banker undertakes to honour the cheques of his customer, the customer on the other hand on his part undertakes, slightly altering the words of Lord Watson, that he will not by the method of drawing his cheque give facilities for its alteration, or, slightly altering the words of Lord Macnaghten, that the customer undertakes that if the banker is misled by the fault of the customer in the manner of filling up the cheques, the loss must fall upon the customer. In this case it is clear, and cannot be disputed, that the method of drawing up the cheques did give facilities for a fraudulent alteration, and that loss resulted from that, and consequently the loss should fall upon the customer and not upon the bank.

HOOD, J. I prefer rather to alter the proposition just stated by saying that the duty of the customer towards his banker is, not to draw his cheques or orders in such an unusual way as to afford facilities for fraud. If the case should arise as suggested in argument where an ingenious chemist was able to remove the ink now ordinarily used in filling up cheques, then the customer, in using the ordinary ink, having done nothing unusual, is not to be penalized for any loss. But if the scientific method became widely known, and it was obvious that that particular kind of

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ink could be readily removed, so that no prudent man would use it on any important document, then if the customer used that ink a jury might hold him liable. That is, if he adopts unusual means for filling up the cheque, he must bear the loss.

Appeal dismissed.

Solicitor for plaintiffs: *C. J. McFarlane.*
Solicitors for defendants: *Moule, Hamilton & Kiddle.*

W. H. M.

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March 29, 30, *April* 26.

THE NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED *v.* O'HEA *and Others.*

Administration and Probate Acts, 1890 (*No.* 1060), *Part V.*; 1903 (*No.* 1815), *ss.* 3, 11—*Properties transferred by way of gift, etc., during life of donor—Probate duty — Whether payable by transferred properties or by estate — Effect of provision in will for payment of duty payable on estate—Donatio mortis causâ —Gift by master to servant of goods in custody of servant—Promise of a gift to charity—Expenditure by others induced thereby—Whether promise enforceable against estate of promisor—Contract.*

The duty payable by virtue of sec. 11 of the *Administration and Probate Act* 1903 (No. 1815), in respect of property transferred colourably or by way of gift during the life of the donor, is to be borne by the property so transferred, unless the donor expressly provides for the payment of such duty out of some other fund.

A provision in the donor's will for "payment of testamentary and administration expenses and all probate legacy and other duty payable on my estate" out of a specified fund does not exonerate the transferred property.

Although the delivery of possession necessary to a valid donatio mortis causâ may be antecedent to the words of gift (as in the case of gift of a chattel to the bailee thereof), the delivery of a chattel by a master into the custody of his servant is not such a delivery of possession as, followed at a subsequent date by words of gift, will constitute an effective donatio mortis causâ.

The legal effect of a promise to donate money to a charity with the object of inducing others to incur liability or expenditure in connection therewith, and with the result that others have been so induced, considered.

ORIGINATING SUMMONS.

This was a summons for the determination of certain questions arising on the construction of the will and codicils and in the administration of the estate of Monsignor Charles Adolphus O'Hea.

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The testator died on 31st August 1903, leaving a will dated 12th April 1892 and two codicils dated respectively 30th July 1903 and 2nd August 1903.

On 22nd October 1903 letters of administration were granted to the National Trustees Executors and Agency Company of Australia Limited (the plaintiff herein), it having been duly authorized to apply for such letters by the executor appointed by the will.

By his will the testator devised and bequeathed all his real and personal estate to the Most Reverend Thomas Joseph Carr, Archbishop of Melbourne, and appointed him sole executor and trustee.

By the first codicil testator gave all his household furniture, pictures, plate, and other household effects, carriage and horses, unto his nephews and nieces. After giving certain pecuniary legacies to various persons he ratified and confirmed a transfer which had been made to him a few months prior to his death to his coachman, Antoni Hoogen, of certain land at Coburg. He directed that all legacies should be free of probate, legacy, or other duty, and should be paid out of money belonging to him and lodged at any bank or banks either on account current or as fixed deposit; and as to the balance of such moneys (if any) so lodged at any bank or banks, "after payment thereout of all debts funeral testamentary and administration expenses and all probate legacy and other duty payable on my estate," he directed his executor to pay and divide the same amongst his nephews and nieces in equal shares, and in other respects confirmed his will. By the second codicil he left certain other pecuniary legacies, directing their payment free of duty out of the same fund as the legacies left by the first codicil. During his lifetime the testator had transferred certain properties and moneys, referred to in the first question raised by the summons (*infra*). The officer appointed for assessing duty on the estates of deceased persons, under sec. 60 of the *Administration and Probate Act* 1890, held that these transfers came within the provisions of sec. 11 of the Act No. 1815, and assessed the duty payable in respect thereof at respectively—(*a*) 170*l*. 6*s*. 4*d*., (*b*) 277*l*., (*c*) 300*l*., (*d*) 11*l*. 4*s*. These amounts had all been paid by the plaintiff as administrator of the deceased.

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The facts material to the matters raised by question (3) of the summons (*infra*) are sufficiently set out in the judgment of A'Beckett, J. (*infra*).

The present summons was taken out by the plaintiff for the purpose of obtaining the opinion of the Court on the following matters:—

1. From what persons or from what properties respectively, if at all, is the plaintiff as such administrator entitled to be repaid or recouped certain payments which as such administrator, and as a condition of obtaining such administration, it has been compelled to make by way of duty in respect of the following lands or moneys parted with by the testator in his lifetime, namely:—

(*a.*) Certain land at Coburg transferred by the testator on the 18th October 1899 to the defendants Thomas Joseph Carr and Mary Lyons to hold as trustees upon certain charitable trusts.

(*b.*) Certain other land at Coburg transferred and conveyed by the testator on the 10th October 1899 to the defendants Thomas Joseph Carr and Maurice McKenna to hold as trustees upon certain other charitable trusts.

(*c.*) A sum of 3000*l.* given by the testator in the year 1888 to the trustees of St. Ignatius' Church, Richmond, to enable the purchase for such church of certain land at Richmond, which was purchased accordingly for 2800*l.*, and is now held by the defendants Joseph Hearn, Joseph Cahill, and Patrick Keating as trustees for such church.

(*d.*) Certain other land at Coburg transferred by the testator on the 23rd day of July 1903 to the defendant Antoni Hoogen which transfer was ratified and confirmed by the first codicil to the said will.

And in particular should such payments of duty respectively be borne by the testator's estate or be repaid or recouped to such estate by or from the several properties in respect of which they were respectively paid as aforesaid or how otherwise?

2. If the aforesaid duty or any part thereof should not be repaid or recouped to the testator's estate as aforesaid, then by or from what portion of such estate should the same be borne or deducted, having regard to the provisions of the said will and

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codicils, and in particular should the same be borne by the fund which by the first codicil is expressly made subject to the payment thereout of all debts, funeral, testamentary, and administration expenses, and all probate, legacy, and other duty payable on the testator's estate?

3. Whether, having regard to the several statements and admissions of fact which have been laid before the plaintiff as such administrator as aforesaid, the plaintiff should or may admit to any and what extent all or any and which of certain claims which have been made affecting the said testator's estate as follows, namely:—

(*a*.) A claim of the defendant Antoni Hoogen to the proceeds of sale of certain horses, carriages, and harness, formerly the property of the testator, and claimed by such defendant to have been given to him by the testator in his lifetime.

(*b*.) A claim by the defendant Michael Hayes on behalf of the Roman Catholic Church at Coburg, for payment of 200*l*., or alternatively of 100*l*., claimed to be due from the testator's estate as under a promise made by the testator.

The questions asked were argued separately.

Weigall for the plaintiff.

Duffy, K.C., and *Hogan* for the defendant Hoogen—As to the gift to Hoogen, it was a good donatio mortis causâ. Actual delivery at the time of the gift is not necessary where the subject of the gift is in the possession of the donee as a bailee, for that possession presupposes an antecedent delivery, which is sufficient: *Vide Williams on Personal Property* (15th ed.), pp. 66, 68; *Alderson* v. *Peel* (*a*); *Winter* v. *Winter* (*b*); *Cochrane* v. *Moore* (*c*); *Kilpin* v. *Ratley* (*d*); *Cain* v. *Moon* (*e*); *In re Weston* (*f*); *Cartledge* v. *Heales* (*g*).

Isaacs, K.C., and *Robinson* for the nephews and nieces of the testator—There must, to constitute a good donatio inter vivos

(*a*) [1891] 7 T.L.R. 418.
(*b*) [1861] 9 W.R. 747; 4 L.T. 639.
(*c*) [1890] 25 Q.B.D. 57.
(*d*) [1892] 1 Q.B. 582.
(*e*) [1896] 2 Q.B. 283.
(*f*) [1902] 1 Ch. 680.
(*g*) [1898] 24 V.L.R. 576.

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be either delivery or such an alteration in the existing state of affairs as amounts to delivery. Here the state of affairs existing before the alleged donatio was disturbed in no way. The horses, etc., had never been in the possession of Hoogen at all. He was not a bailee. Being a mere servant, his possession was his master's. Where the intended donee is a bailee all that is necessary is to change the terms of his possession. Where he is a servant there has never been any delivery of possession even antecedent to the proposed gift—he has the custody merely. A bailment implies possession coupled with a trust: *Irons* v. *Smallpiece* (*h*); *Anning* v. *Anning* (*i*); *Solicitor to the Treasury* v. *Lewis* (*k*).

Duffy in reply—The only rule is that all must be done which can be done to change the nature of the possession howsoever acquired. *Winter* v. *Winter* (*supra*) was the case of a servant.

Mitchell, K.C., for the defendant Hayes—Where a person has promised to give a sum for a certain purpose in order to induce the expenditure of money for that purpose, and other persons have been induced thereby to incur liabilities to effect that purpose, the promise will be enforced. If the promisor has died without fulfilling his promise, it may be enforced against his executors: *Cottage-street Methodist Church* v. *Kendall* (*l*); *University of Des Moines* v. *Livingstone* (*m*); *Re Hudson, Creed* v. *Henderson* (*n*); *Anson on Contracts* (10th ed.), pp. 90, 91; *Currie* v. *Misa* (*o*).

Isaacs—Assuming the law here to be the same as laid down in the cases cited, the facts here exclude its application to this case.

On the question of duty,

Isaacs, K.C. (with him *Robinson*)—The whole liability depends on the Act No. 1815. It must be taken as admitted, for the purpose of this summons, that the conveyances to Hoogen and to the Archbishop come within sec. 11, and they are therefore to be deemed "to have made the property to which they relate

(*h*) [1819] 2 B. & Ald. 551.
(*i*) 21 N.S.W. L.R. (Eq.) 13.
(*k*) [1900] 2 Ch. 812, at 871.
(*l*) 23 American Rep. 286.
(*m*) 42 American Rep. 42.
(*n*) [1885] 33 W.R. 819.
(*o*) [1875] L.R. 10 Ex. 153.

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chargeable with the payment of the duty payable under the *Administration and Probate Acts* as though part of the estate of the donor." If these properties were in fact part of the estate of the testator, they would undoubtedly (apart from any special provision in the will) have to bear the duty payable in respect of them. The right given to recover the duty under the principal Act is as well *in rem* as *in personam*: *Graham* v. *Graham* (*p*). Where one person pays off the debt of another, or where one property pays off the incumbrance on another, under circumstances such as these, there arises a right to indemnity: *Bouner* v. *Tottenham* (*q*); *Moule* v. *Garrett* (*r*); *Wolmerhausen* v. *Gullick* (*s*). That is the real position here. For the purposes of the revenue the law makes the executors pay this duty in the first instance out of the estate. But the estate is not benefited thereby. The payment is really made for the benefit of the owners of the transferred properties.

Weigall for the trustees—If the duty is to be borne by the estate and not by the property transferred *inter vivos*, it would lead to the result that where the estate is small it might be insufficient to pay the duty; or you might have a case where the whole of a man's property was transferred under circumstances which would bring it within sec. 11. As there would be nothing in his estate, there would be no fund for the payment of the duty.

Hogan (with him *Duffy, K.C.*) for the defendant Hoogen—Sec. 11 puts these gifts for purposes of duty in the same position as they would be in if they were devises, bequests, or legacies under a will. To ascertain the ultimate liability for duty we are thrown back on the law as to devises, etc., under the 1890 Act. The general rule is that the duty may be deducted from each devise or bequest *pro rata* (sec. 103), "unless the testator should have made a different disposition as to the payment of the said duty." Here he has done so by the first codicil by indicating a specific fund out of which duty is to be paid. Even if the words "duty payable on my estate" do not include the duty

(*p*) [1874] 5 A.J.R. 100.
(*q*) [1899] 1 Q.B. 161.
(*r*) [1872] L.R. 7 Exch. 101.
(*s*) [1893] 2 Ch. 514.

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payable on these gifts, still as payment of such duty has to be governed by the payment of duty on devises, etc., under the will, and as such devises are here exempted from payment, these gifts are also exempted. As to the contention that it is inequitable that the nephew and nieces should pay duty on property which other people have the benefit of, that does not express the true position. The codicil does not bequeath all the money in the bank to the nephews, etc., and direct that the duty should be paid out of such bequest. It specifies a fund which is to bear the payment of duty, and then bequeaths what is left after such payment to the nephews and nieces.

Macfarlan for the defendants Archbishop Carr and others—The argument for the nephews for making the transferred properties bear the duty proceeds on the assumption that sec. 11 makes the duty a statutory "charge" upon them. If that were the intention of the Legislature it would have been easy to say so. The words actually used mean, in their ordinary sense, that duty is to be payable in respect of these properties. The Legislature is defining in this section, not the method of the recovery of duty (namely, by making it a charge), but merely the property in respect of which duty is payable. The argument as to the possibility of there being no assets, or insufficient assets, in a testator's estate to pay the duty does raise a difficulty, but it may well be that that is a contingency which the Legislature has overlooked. The contrary view gives rise to as great difficulties, for in many cases it would be impossible to get at the transferred property. If this language creates a statutory charge on land transferred *inter vivos*, the consequences will be very serious to purchasers, and cannot have been intended. "Probate duty payable on my estate" means all duty payable by the executor as a condition precedent to obtaining probate: *Blackwood* v. *The Queen* (*t*). The payment of the duty on this property is such a condition precedent, and the duty is therefore covered by these words in the codicil. The duty on the gifts is paid as much for the benefit of the estate (in order to obtain probate) as for the benefit of the donees. The words "testamentary expenses" used

(*t*) [1882] 8 App. Cas. 82.

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in the codicil are themselves wide enough to carry these duties: *Vide In re Clemow* (u); *In re Treasure* (v).

He also referred to *Direct Spanish Telegraph Co.* v. *Shepherd* (w).

Higgins, K.C. (with him *Power*) for the defendants Hearn and others—The Crown has no right to duty on the property the subject of these gifts. In any case the amount on which duty would be payable was not 3000*l.*, but the value of the land at the date of testator's death, or the value of the reversionary interest when the money was given.

[A'BECKETT, J., ruled that on the questions submitted these contentions were not open to the parties.]

Isaacs, K.C., in reply—*In re Bell* (x) illustrates the distinction between the testator's estate and what shall for certain purposes be regarded as his estate. The words in the codicil are "duty payable on my estate," not "out of my estate."

A'BECKETT, J., read the following judgment:—I have to determine on originating summons several questions of law which have arisen in the administration of the estate of Monsignor O'Hea. There is no conflict about the facts, which are admitted to have been correctly set forth in the affidavits and written statements before me. Monsignor O'Hea was a Dean of the Roman Catholic Church, and died at the Deanery at Coburg on the 31st of August 1903. Administration to his estate, with will annexed, was granted to the National Trustees Company.

The first matter to be dealt with is a claim for 200*l.*, to supplement a gift of 500*l.* made by the Dean in his lifetime to a fund for the completion of the Presbytery at Coburg. It appears that he had spoken of giving six or seven hundred pounds for the building, and it is contended that he had done so in such a way, and with such consequences, as to justify a claim against his estate for the balance unpaid at his death. I have been referred to American authorities, which decide in effect that, where a promise has been made to give a certain sum for a certain purpose, as an inducement to expenditure for

(u) [1900] 2 Ch. 182, at p. 195.
(v) [1900] 2 Ch. 648.
(w) [1884] 13 Q.B.D. 203.
(x) [1877] 3 V.L.R. (I.) 26; [1877] 2 App. Cas. 560.

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that purpose, and persons are thereby induced to incur liabilities, the promise may be held to be binding as against the promisor's executors, should he have died without fulfilling it. Conceding that English Courts would give relief upon the same equity, it should certainly be given cautiously, and only in cases which left no doubt of a distinct promise, and of action clearly induced by the promise. The facts before me fall short in this respect, though I entertain no doubt of the truth of the statements on which the claim is based.

In October 1902 the Dean told Father Hayes, the parish priest of Coburg, that he would give 500*l.* towards the completion of the Presbytery, which was expected to cost between six and seven hundred pounds. A few weeks afterwards, the Dean saw Father Hayes, and told him that if he would go on with the work he would give 500*l.*, and 100*l.* later on. Plans were subsequently prepared by an architect, Mr. Smart, which included a verandah and balcony, bringing the probable cost up to 1150*l.* Father Hayes proposed to dispense with the balcony and verandah, and under his direction the architect called on the Dean in November 1902, and told him the probable cost and that Father Hayes desired to reduce it by dispensing with verandah and balcony. He said, "I will give 600*l.* or 700*l.* if the whole thing is done properly. It will be useless without the verandah and balcony." The architect advertised for tenders. The lowest tender was for 1115*l.* In January Mr. Smart and Father Hayes met the Dean in his carriage, and, in a short conversation, asked him to sign the contract for the work. The Dean appeared to be angry, said he would sign nothing, and asked Mr. Smart to see him on the following afternoon at the Archbishop's. Father Hayes, in reference to this interview, says—"He said to me 'I will give you what I promised;' I replied, 'You ought to give me 1000*l.*'" The Dean met the architect at the Archbishop's the next day, as arranged, and what occurred there is thus described—"The Dean said to the Archbishop, 'I've come to give you 500*l.* to keep for the Presbytery; you must keep it till the verandah and balcony are finished. The contract must be signed for the whole thing.'" He then handed his cheque to the Archbishop. This I regard as the conclusive arrangement. It shows what the Dean

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was willing to give, if and when the building was erected in accordance with the completed design he had asked for. The announcement was made when the Dean was perfectly free to change his mind, and give less than he had previously spoken of giving, and nothing was said to suggest that more than 500*l.* would be expected from him. The contract was not then signed, and need not have been, if the persons who entered into it had not been content to proceed on the contribution of 500*l.* In those circumstances it would be too much to say that the Dean had placed himself or his administrator under a legal obligation to give 200*l.* in addition to 500*l.* Though he said to Father Hayes, about six weeks before his death, "I suppose they will expect me to keep my contract," I cannot, on the strength of this observation, find any binding engagement to pay 200*l.*

The next question relates to horses, harness, and carriages, which the Dean, on his death-bed, desired to give to his coachman, Antoni Hoogen, who had been for over thirteen years in his service, and for the last three years his close attendant. On the 10th of August, after referring to his faithful service, the Dean said to him—"I have done something for you; I want to do more. I give you the horses, the harness, and the carriages; keep them here till you dispose of them." Hoogen said—"I cannot take them; there is no one here to witness." Shortly afterwards Father Collins, a priest in attendance on the Dean, came in, and the Dean said to him—"I want to give Tony the horses, the harness, and the carriages; I want you to witness that." About half an hour afterwards Father Collins said—"What is it precisely that you want done with the horses and vehicles?" The Dean said—"Have I not already told you I gave them over in your presence?" Hoogen said—"Thank you very much." The Dean never left his room after this. Hoogen kept the chattels in his possession at the Deanery. He had in his sole charge and possession the keys of the coach-house and stables in which they were kept, and this continued until after the Dean's death. About four days after the 10th of August the Dean said to him—"Are you still keeping the horses and carriages here?" Hoogen said he was, and the Dean told him that he could keep them there and use his fodder to feed them. The

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validity of this gift is in question, and, pending a decision, the chattels were sold, with the consent of all persons interested, and realized 185*l* 18s. 6*d*. net, now held by the administrator.

On these facts I hold that the intended gift was a donatio mortis causâ. The condition that the gift is not to be effectual in case of the donor's recovery need not be expressed, but may be implied from the circumstances under which it was made. Treating it as a gift of this kind, one of the essentials to its validity is that there should be delivery of some sort of the thing given, though the delivery may be antecedent to the gift: *Cain* v. *Moon* (y). In that case a deposit note was handed by a daughter to her mother some time before her death, telling her mother not to part with it. Some time after the mother visited the daughter, who was seriously ill and said she did not think she could live. "The note is for you if I die." This was held good. Lord Russell said—"I concede that there must be a delivery to the person to be benefited of the subject of the donatio mortis causâ, but in my judgment there is no reason why an antecedent delivery should not be effective." In the case which I have to deal with there was no attempt at delivery. The subject of the gift was in the actual possession of the donee. It was contended on his behalf that in these circumstances no delivery was necessary. It was said to be a case within the rule, as stated in *Williams on Personal Property* (15th ed.), p. 68—"Where goods are in the possession of a bailee, it is held that there may be a valid gift of them from the owner to the bailee by mere word of mouth expressing an intention of present gift, coupled with that change of possession which takes place when the bailee, with the donor's consent, ceases to hold the goods as bailee and begins to hold them for his own exclusive use as owner." Reliance was placed upon two cases—*Alderson* v. *Peel* (z) and *Winter* v. *Winter* (a). In the first case a picture had been lent, and a letter was some time after written to the person to whom it had been lent telling him he might keep it, and the gift was held good. In the second case—"A barge, while in possession of the donee and worked by him as servant to the owner, was

(y) [1896] 2 Q.B. 283.
(z) [1891] 7 T.L.R. 418.
(a) 4 L.T. (N.S.) 639.

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given to him by the owner by word of mouth. Afterwards the donee worked it and paid the wages of the crew on his own account until the donor's death, and the gift was held to be complete." Both were gifts *inter vivos*. *Winter* v. *Winter* is most in point here, because there, as here, the donee was servant of the donor, and held possession as such at the time of the gift. Its force in favour of the donee is, however, weakened by observing the stress laid in the judgments on the actual change of possession—an open user of the barge by the donee for himself; manifestly different from its user when the property of the donor. Compton, J., says:—"It is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership had been changed." *Irons* v. *Smallpiece* (*b*) also shows how a change in the character of the possession might affect the ownership in case of a gift which would be ineffectual without it. I have not to decide what the rights of the parties would have been if, after the verbal gift, the donee had taken the chattels away and let them out on hire for his own benefit, or paid a livery-stable keeper for taking charge of them. Nothing of this sort took place; the actual custody and user or non-user of the chattels continued the same after as before the gift.

It was said, in opposition to the validity of the gift, that the general rule above stated from Williams does not apply as between master and servant; that a servant has not possession as bailee within the meaning of it. "A servant in charge of his master's property, or a person having the use of anything by the mere licence of the owner generally, has not possession": *Pollock and Wright on Possession*, at p. 58. I decide against the gift on the ground that there must be delivery to constitute a good donatio mortis causâ and that there was none here. It would be dangerous to relax a rule which requires some visible act as an essential, when the only other essential is that certain words should be spoken. The possession of the servant is the possession of the master, not only in the eye of the law, but in the eyes of those who observe master and servant and thing possessed. In this case nothing was done which would indicate a change in possession. It could not be said that the Dean had

(*b*) [1819] 2 B. & Ald. 551.

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at any time made delivery to his coachman of any of the chattels which were in his custody at the time when they were given to him, or that that custody differed from the ordinary custody by a servant of his master's goods. When things are in such custody I hold that there can be no effectual gift of them by the master merely telling the servant that he may keep them as his own. Nothing more occurred here. I regret that the rule of law disappoints the Dean's intention and the servant's expectations; but the nephews and nieces, to whom the 185*l.* 18*s.* 6*d.* must go in the first instance, may have the pleasure of returning it to Hoogen, less the probate duty, without any doubt as to their doing what the Dean would have wished them to do.

I have next to deal with questions arising as to payment of duty under the *Administration and Probate Act* 1903. The testator made certain gifts, which fell within sec. 11 of that Act, which provides that every conveyance, assignment, gift, etc., of estate, real or personal, purporting to operate as an immediate gift, shall, if made within twelve months of death, or relating to property in which the donor retained any interest, be deemed "to have made the property to which the same relates chargeable with the payment of the duty payable under the *Administration and Probate Acts* as though part of the estate of the donor." I have to decide whether the effect of these words is to make the duty payable out of the property in respect of which it is imposed, and if so, whether the administrator, who has under compulsion paid the duty on these gifts, has a right to recover what it has so paid against the properties the subject of the gifts, or the owners of the properties. Sec. 2 of the Act of 1903 provides that it "shall be construed as one with Part V. of the *Administration and Probate Act* 1890." Sec. 11 is the only section of the Act of 1903 to which we can look to see how the duty imposed is to be recovered, and it evidently contemplates that the means provided by the Act of 1890 are to be resorted to. What, then, are the means available for obtaining payment of duty on the estate of a testator under the Act of 1890? The executor is bound to pay the duty, as a debt of the testator, under sec. 102. If it is not paid within the time limited, the Master in Equity may apply to the Court,

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which may order that a sufficient part of the testator's property may be sold, and the proceeds applied in payment of the duty. The late Mr. Justice Molesworth, in *Graham* v. *Graham* (c) declared the remedy given by the Act to be "*in rem* direct, not merely *in personam*." Under sec. 103, the executor is to deduct from each devise and bequest an amount equal to the duty paid in respect of it, unless the testator shall have made a different disposition by his will. These provisions may be difficult to work out, and great difficulties have arisen under sec. 103, but the result which they were intended to bring about is that, though the whole duty payable may be recovered by the Crown from any one property, and though the executor may sell any one property to pay the whole duty, still, as between separate owners of separate property, in the absence of the testator's direction to the contrary, the duty would have to be adjusted as between the different properties, so that in a sense each property may be said to be charged with the duty payable in respect of it.

Then, coming to the new law where, by the operation of sec. 11, other properties "are chargeable with the payment of the duty, as though part of the estate of the donor," I think the executor has the same duty of paying, and the Crown the same means of obtaining payment as with regard to properties passing by the will. The executor could, I think, enforce a sale of those properties, while belonging to the donee, in order to raise the duty payable upon them. There would be difficulties as to procedure in all cases, as the properties would not be vested in the executor or under his control by force of sec. 11. In some cases the difficulty might be insuperable. The subject of gift might be lost or destroyed. The donee might be insolvent. Land under the *Transfer of Land Statute* might have been transferred to a purchaser, whose title under the Act could not be impeached. Notwithstanding these difficulties, I think that, having been remitted by the Act of 1903 to the system under the Act of 1890, its analogies should be followed as far as practicable, and that the Court would find a way to relieve persons taking under a will from the duty paid out of these properties on properties given away in the testator's lifetime. Where the amount

(c) [1874] 5 A.J.R., at p. 101.

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A'BECKETT, J.

1904

THE NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED v. O'HEA.

required to pay duty, under sec. 11, can be raised from the properties subject to it, or obtained from the persons to whom they belong, I think it is the duty of an executor to obtain it either to pay in the first instance, or to recoup to his testator's estate what may have been paid out of it. This can be done in the present case, and I think it ought to be done. It seems to me inequitable that beneficiaries under a will should be deprived in order to pay the tax on gifts made by the testator in his lifetime, and sec. 11 appears to me sufficient to give beneficiaries under the will a right to be recouped. I have some doubt upon the point, and am not clear as to the process which should be adopted to obtain payment out of the donee's properties when payment is refused. These difficulties do not exist in the present case, as the donees are ready and willing to pay, if they ought to pay.

I have now to consider whether, assuming that the testator's estate should be relieved of this payment in the absence of any direction to the contrary by the testator, there is any direction to the contrary in the will before me. It has been contended that such a direction is to be found in the first codicil, which, after giving certain legacies to be paid out of moneys in the bank on current account or fixed deposit, gives the residue to the legatees "after payment thereout of all debts funeral testamentary and administration expenses and all probate legacy and other duty payable on my estate." I have been referred to authorities giving a very wide interpretation to the words "testamentary expenses," which might cover the duties in question, but I think it should not be adopted in the present case, where the words are associated with other words dealing specifically with duties. Those which seem to me material are "probate legacy and other duty payable on my estate." I cannot think that, by the words "my estate," the testator intended to include property which he had given away in his lifetime. These did not become part of his estate, but were to be deemed so for a limited purpose under the Act of 1903. "My estate" means the estate which the testator is disposing of by his will. The Statute cannot vary the construction to be placed upon the words in the codicil. It creates a new and peculiar tax, and I have to say whether this tax comes

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within the words duty "payable on my estate." I hold that it does not. This disposes of all the questions I have to answer except as to costs.

As to costs, the circumstances are exceptional, and various interests are represented. I leave the claimants of the 200*l.* to abide their own costs. I shall also leave Antoni Hoogen to abide his own costs. Although his claim was meritorious, I should not feel justified in making the legatees, or the residuary legatee, pay his costs. I also leave the persons opposing the claim for duty under sec. 11 to abide their own costs. The legatees have successfully maintained their position as to payment of duty under sec. 11, as well as upon the questions of construction of the will and of the donatio mortis causâ. I give them their costs out of the residuary estate. The administrator will, of course, be entitled to its costs out of the same fund.

The questions asked by the summons may be answered as follows:—

1. The payments mentioned in question 1 should not be borne by the testator's estate, but should be recouped by or from the several properties in respect of which they were paid, or by the owners thereof.

2. Need not be answered.

3. The plaintiff should not admit claim (*a*); claim (*b*) has been withdawn, and claim (*c*) should not be admitted in any form.

Direct plaintiff's costs to be taxed as between solicitor and client, and retained out of residuary estate.

Direct legatees' costs to be taxed, and to be paid by plaintiff out of residuary estate.

Other parties to abide their own costs of summons.

Questions answered accordingly.

Solicitors for the plaintiff: *Gavan Duffy & King.*

Solicitors for the defendant nephews and nieces: *Gaunson & Lonie.*

Solicitor for the defendant Hoogen: *W. H. Walker.*

Solicitor for the defendant Hayes: *C. J. McFarlane.*

Solicitor for defendants Carr, Lyons, and Cahill: *Mornane.*

Solicitor for defendants Hearn, Cahill, and Keating: *G. F. A. Jones.*

J. M.

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F.C.

1904
May 30.

BEECH *v.* POTTER.

County Court Act 1890 (*No.* 1078), *s.* 64—*Special summons—Claim for use and occupation—Debt or liquidated demand.*

An action for use and occupation may be commenced by special summons under sec. 64 of the *County Court Act* 1890.

Rock Freehold Land Company v. *Cunliffe* ([1894] 20 V.L.R. 328) overruled.

APPEAL FROM COUNTY COURT.

The plaintiff, Eliza Ellen Beech, commenced an action in the County Court at Melbourne against the defendant, Charles Vincent Potter, by a special summons under sec. 64 of the *County Court Act* 1890. The part of the summons material to this report was as follows:—

"The plaintiff demands of you payment of the sum of 42*l.* for use and occupation of land, house, and furniture, of which the following are particulars:—

"Use and occupation of the above, 64 weeks at 1*l.* per week	64*l.*	0*s.*	0*d.*
"The like, 185 weeks at 15*s.* per week	138*l.*	15*s.*	0*d.*
	202*l.*	15*s.*	0*d.*
"Payment between these dates	160*l.*	15*s.*	0*d.*
"Plaintiff claims	42*l.*	0*s.*	0*d.*"

Defendant entered a defence, and the cause came on for hearing in the County Court on 14th December 1903, when counsel for the defendant took the objection that the summons instead of being on a special summons form should have been on an ordinary form of County Court summons, and referred to the case of *The Rock Freehold Land Company* v. *Cunliffe* (*a*).

The Judge refused an application by plaintiff's counsel to amend by allowing the plaintiff to claim alternatively for rent, and struck out the cause with costs.

No evidence was given at the hearing.

From this decision the plaintiff appealed to the Full Court.

(*a*) [1894] 20 V.L.R. 328.

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Barrett for the appellant—A claim for use and occupation may be brought on a special summons under sec. 64. It is a claim for a liquidated demand. Under the old form of action debt lay for use and occupation—it was one of the common *indebitatus* counts, and the proper and ordinary plea to it was "never indebted." The point was not really in dispute in *Rock Freehold Land Co.* v. *Cunliffe* (*b*)—it seems to have been assumed by counsel that if the claim were for use and occupation the writ could not be specially indorsed. The question really fought there was whether the claim was in fact for use and occupation or for rent.

He referred also to *Chitty on Pleading* (7th ed.), vol. i., pp. 121, 122; *Hourigan* v. *McPherson* (*c*)

(He was stopped by the Court.)

Macfarlan (with him *Meagher*) for the respondent—Sec. 64 contemplates claims where the amount is ascertained or is a mere matter of calculation: *Vide* sub-sec. (3), which in default of notice of intention to defend empowers the plaintiff to forthwith enter final judgment for the amount claimed. A claim for use and occupation is a claim for damages, and the *quantum* of damages to be recovered is such as will be a reasonable satisfaction for the land used and occupied: *Cf. Landlord and Tenant Act* 1890, sec. 22. What is a reasonable satisfaction is matter of evidence and a question for the jury. The section does not contemplate claims for damages unless liquidated.

[HODGES, J. Use and occupation is as much a liquidated demand as goods sold and delivered or work and labour done where the price has not been agreed upon beforehand.]

It is very doubtful whether work and labour done can be the subject of a specially indorsed writ where no rate has been fixed. It has never been so decided. *Connolly* v. *Teeling* (*d*) is a decision to the contrary on similar words in the Irish *Common Law Procedure Act*. It is not to be assumed that every claim which might have been the subject of an action for debt under the old procedure can be brought by special summons or by specially indorsed

(*b*) [1894] 20 V.L.R. 328. (*c*) [1903] 29 V.L.R. 139.
(*d*) 12 Ir. C.L.R. (App.) 29.

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writ. Where interest is claimed by way of damages only it cannot be the subject of a specially indorsed writ: *Gold Ores Reduction Co.* v. *Parr* (e).

MADDEN, C.J. We think that in this case the appeal should be allowed. Sec. 64 of the *County Court Act* 1890 prescribes, it is true, that a summons shall be in the form of a special summons where the claim is for a debt or liquidated money demand. In the absence of any express intention of the Legislature to vary a term well known in law, the presumption is that it has its accustomed and well-known meaning. And there is no doubt that these two words, debt and liquidated money demand, have a well-known meaning. Where there is a transaction and the contract has reached such a stage that everything is complete except payment of the consideration, there arises an action of *indebitatus assumpsit* —an action for debt or money demand. In the present case "use and occupation" is the form in which the plaintiff sues and that has always been an action which came within the category of debt. It is said that it ought not to come within the category because this is an action for an unliquidated money demand—an indefinite sum. It is said that use and occupation is distinguished from rent—that it is a claim for an amount representing the reasonable value of the use of the premises and is not specific. But the same criticism would apply to a case of goods sold and delivered, or work and labour done, or interest upon money, or money had and received, in many of which the amount has to be ascertained, because no specific amount has been agreed upon. All these are unquestionably actions of debt or for a liquidated demand, notwithstanding the actual amount has not been determined beforehand, but has to be estimated on stated terms, if the plaintiff is right. We therefore think the learned Judge was in error in striking out this case upon this ground.

A'BECKETT, J. I think my decision in the case of *The Rock Freehold Land Co.* v. *Cunliffe* should be considered erroneous. It proceeded upon the concession by counsel that if the action were for use and occupation it could not be brought on a specially indorsed writ. I accepted that view, and merely

(e) [1892] 2 Q.B. 14.

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considered the only question I was asked to consider—namely, whether the action was for use and occupation or for rent. I reserved my decision, and concluded that it was for use and occupation. But although that was so, I think it could have been the subject of a specially indorsed writ. My decision proceeded upon a wrong ground.

HODGES, J., concurred.

Appeal allowed.

Solicitors for appellant: *Phillips & Clarke.*
Solicitors for respondent: *Madden, Drake & Candy.*

J. M.

MONTAGUE *v.* LAWSON.

HOOD, J.
1904
June 29, 30

Practice—Affidavit—"On the return of the order to review"—Adjournment of order to review—Affidavit filed after return day fixed by order nisi to review—Justices Act 1890 (*No.* 1105), *s.* 146.

Where the hearing of an order to review has been adjourned, an affidavit filed after the return day fixed by the order *nisi* may be read upon the adjourned hearing.

ORDER TO REVIEW.

Coldham for the informant to move the order absolute.

Power for the defendant to show cause.

Coldham—There is a preliminary objection that the answering affidavit on behalf of the defendant, being filed after the return day fixed by the order *nisi*—namely, the 15th June (the hearing having been adjourned by consent from that day, first to the 21st June, and then until to-day)—cannot be read. When once a case is called on the hearing is commenced, and it is the continuation of the hearing that is adjourned. The practice has been not to allow affidavits to be filed after the return day.

Power—The answering affidavit may be filed at any time before the actual hearing. This is in fact the return day, it having been postponed from time to time by consent of the parties. The facts

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here are that there has been a change of defendant's solicitors, and the present solicitors filed the affidavit as soon as they possibly could.

Cur. adv. vult.

HOOD, J. I have to dispose of a preliminary objection to the reading of an affidavit upon the hearing of an order to review.

The order *nisi* was returnable originally on the 15th June. It was then by consent adjourned from time to time to the 29th June, and on the 28th June, for the first time, the defendant filed an affidavit. It was objected by counsel for the informant that that affidavit was filed too late, and ought not to be considered, and that the respondent to an order *nisi* was bound to file his affidavit or affidavits before the original return day. That argument was mainly founded on the words of sec. 146 of the *Justices Act* 1890, which provides that—"On the return of the order to review the Full Court"—now this Court—"may on a consideration of the evidence and materials adduced and brought before the said Court of Petty Sessions or the justice or clerk and if the Full Court shall think fit of any further evidence either oral or by affidavit," etc. Counsel contended that those words "on the return of the order to review" mean on the original day fixed by the order *nisi*. But consideration has induced me to think that that is not so, and that those words mean "on the return of the order *nisi* or any adjournment thereof. The section provides for the hearing of the case "on the return of the order to review," and if that were read strictly to mean upon the day fixed by the order *nisi*, the Court would never have power to adjourn the case, and if for any reason it did not come on for hearing on that day would never have power to hear it.

Counsel also put it as a question of practice. So far as I can see, there is no express decision on the matter, but in dealing with the practice as to motions and rules under the old common law procedure, it is stated in *Chitty's Archbold's Practice* (12th ed.), p. 1586, that "in practice affidavits are frequently sworn and handed to counsel after the day named in the rule for showing cause against it." That may show remissness on the part of solicitors, but on the other hand it shows that there is no possible

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serious objection to the proceeding, otherwise the practice would never have grown up.

In addition to that, even if the strict construction were given to sec. 146, it has been frequently disregarded, and the practice has been to allow affidavits to be filed even after the hearing has commenced. In the case of *Young* v. *Mook Ah Meng* (*a*), where the applicant had omitted to file an affidavit as to some technical matter, and an order *nisi* was granted without it, at the hearing on the return of the order *nisi* a preliminary objection that there was no such affidavit was allowed, but the argument was allowed to proceed on the applicant paying 2*l*. 2*s*. costs and filing the affidavit in question. That shows that the Court holds very liberal views with regard to this matter. Moreover, Order LXX., r. 1*, gives power to the Court or a Judge, where there has been a non-compliance with any rule of practice for the time being in force, to amend or otherwise deal with the proceedings in such manner and upon such terms as he or it thinks fit.

Preliminary objection overruled.

Solicitor for the informant: *Guinness*, Crown Solicitor.
Solicitors for the defendant: *Nolan & Nolan.*

H. I. C.

[PRACTICE COURT.]

A'BECKETT, J.
1904
June 15.

MAYOR, ETC., OF ARARAT *v.* MARTIN.

Water Act 1890 (*No.* 1156), *ss.* 458, 483—*Water Act* 1900 (*No.* 1651), *s.* 153—*Water rates, liability to pay—Refusal to supply water—Demand for payment of rates, sufficiency of.*

Under sec. 458 of the *Water Act* 1890 upon the fulfilment of certain conditions the owner of property is liable to pay water rates "unless the Board refuse to supply" him with water.

Under that provision, where the Board has cut off the water from such an owner for the non-payment of prior water rates this would amount to a refusal to supply, and such person would not be liable for water rates during such period under the above-mentioned act.

By the *Water Act* 1900, sec. 153, power is given to the Board to cut off the water supply for non-payment of rates, and such "cutting off" is not a refusal to supply the owner of the property with water.

Held, that the provisions of sec. 153 are not retrospective and that where the

(*a*) [1891] 17 V.L.R. 140.

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Board has cut off the supply prior to the passing of the Act of 1900 the owner is not liable until and unless he has been again supplied with water and the Board has cut off the supply afterwards.

Semble, a demand for payment of rates due for several years made first before action brought to recover rates is sufficient under sec. 483 of the *Water Act* 1890, although no demand was made from time to time as each rate became due.

ORDER TO REVIEW.

The complainants, the Mayor, Councillors, and Burgesses of the Borough of Ararat, a local governing body under Part VI. of the *Water Act* 1890, sued the defendant, William Martin, in the Court of Petty Sessions, Ararat, for arrears of water rates for six years. It appeared that the water main passed defendant's property, and that water was available if the defendant wanted it, but that the supply to his premises had been cut off in 1894, owing to his failure to pay the rates then due, and that he had never since been supplied with the complainants' water. It also appeared that a demand was made on the defendant for payment in October 1903, prior to the commencement of proceedings, but no other demand for payment as the rates fell due from year to year was put in evidence. The Police Magistrate held that, as the water passed defendant's property, he was supplied under the Act, and that sec. 153 of the *Water Act* 1900 was passed to meet such a case, and an order was made for the amount of rates due since the passing of that Act in 1900.

The defendant obtained an order *nisi* to review on the grounds —(1) that the complainants had refused to supply the defendant with water; and (2) that no proper demand was made.

Schutt to move the order absolute.

Box to show cause—The rates are chargeable whether the water is taken or not by the owner or occupier of the property. It would be impossible for local bodies to carry out their water schemes otherwise. The authority to recover is given by Part IV. of the *Water Act* 1890, secs. 516, 517, the latter section incorporating Part V. The mere fact of publication of the by-law making the rate in the *Government Gazette*, under sec. 520, fully makes the ratepayer liable. The supply of water is not compulsory: sec. 428; but sec. 458 carries out the view that the notice that the mains are ready is notice to every owner or occupier within

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the district that he is to pay the rates, and whether he takes the water or not does not matter. "Unless the Board refuse to supply such owner or occupier with water" does not apply to a case like this, but refers to some physical impossibility of any supply being afforded and not where the water has been supplied and the person supplied refuses to pay and the water is then cut off.

[A'BECKETT, J. I think if you cut him off because he does not pay that is a refusal to supply him with water, and he would not be liable in the future, although he would be for past rates remaining unpaid.]

The construction of the Act would seem to be otherwise: Secs. 459, 480, 482, 483. The fact that the main passes the defendant's property shows that he was supplied. He could have the water if he wanted it. Sec. 153 of the *Water Act* 1900 makes him liable at least for rates since the passing of that Act, but it is submitted that he was liable before the passing of the Act. As to the second ground, there was ample demand under sec. 483. The summons itself is a sufficient demand. It is not necessary that the demand should be in writing, or that it should be made from year to year.

Schutt in reply—The refusal to supply here excuses the defendant. Sec. 153 of the amending Act shows that sec. 458 did apply before to cases of refusal to supply by cutting off for non-payment of rates.

[A'BECKETT, J. I think that if the water is cut off there is a refusal to supply, although I agree with counsel that the original Act probably contemplated other matters than the mere cutting off where there was a refusal to pay.]

The *Water Act* 1900 does not apply. Sec. 153 is not retrospective, and only applies to a person supplied with water. The defendant has never been supplied since the passing of that Act. Part III., Div. 2, of the 1900 Act should be read with Part V., Div. 2, of the 1890 Act. Only Div. 1 of Part V. of the 1890 Act is incorporated in Part VI. of that Act. Sec. 153 being in Div. 2 of Part III. of the 1900 Act therefore does not apply: *Hardcastle on Statutes* (3rd ed.), 352. As to the second ground, sec. 483 requires a demand before action. There should be a separate

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MAYOR, ETC., OF ARARAT v. MARTIN.

demand for the rates for each year. If one demand is made for a number of years lumped together, a defendant would not be perhaps in a position of making a defence, and would be embarrassed.

Box (by permission) referred to *Fellows* v. *Board of Land and Works* (*a*).

A'BECKETT, J. This is a proceeding to recover water rates from a person who would be liable, apart from the question of the water supply having been cut off, for a period during which he was in point of fact cut off from the water by the act of the authority controlling the water supply. One of the objections raised was—"You have no right to sue me for the period during which, by your own act, you prevented me from getting water, and that is a refusal on your part to supply water." Counsel has urged that, if I give way to that objection, I am sanctioning the view that the liability to pay for water depends upon actual user of the water, and that it sanctions the position of the man who says—"I do not want the water, and I am not going to pay for it." I do not sanction that view. I agree with counsel's argument as to the general effect of the Act. Where certain conditions exist, the liability arises independently of the actual supply of water, and where those conditions exist a man cannot say—"I do not want the water. I do not use it, and I will not pay for it."

This proceeding is brought under certain sections of the *Water Act* 1890. Sec. 458 is the preliminary one material to look at. It provides that, after the district is reticulated, a notice shall be given, and then after one month from the last publication of such notice, the owner shall be liable to pay the rates and charges. But the section contains a very material qualification to that, viz., "unless the Board refuse to supply such owner or occupier with water." The Board, or local authority, did in this case "refuse to supply such owner or occupier with water" by cutting the water off, and they were at liberty apparently to take that course, but I think that, having taken that course, the person who was thus cut off from supply would be at liberty to regard himself

(*a*) [1861] 1 W.W. & A'B. (L.) 198.

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as a person to whom the supply had been refused, and would, apart from subsequent legislation, be in a position to resist proceedings for that period of exclusion.

Then comes new legislation, and that new legislation is to be found in sec. 153 of Act No. 1651. Beyond all question that section contemplates that where a person who is connected with the water supply, as this defendant was, fails to pay the authority, the authority can cut the water off, and on cutting the water off, they do not terminate his responsibility for the rates, and if this Act had been in force when this water was cut off, this defendant here would have been liable. But counsel points out that the framing of the Act is such as to exclude the benefit of it from the authority which has, at an antecedent period, availed itself of the power it possessed of cutting off the water. I think that, having done that act at a time when the cessation of the water supply extinguished liability, that liability is not revived by this Act, and that in order to make this Act applicable, the person from whom the water is cut off must be in the position of a person supplied with water under sec. 153, so that in order to get the benefit of this Act a person who is to be visited with liability must be in the position of a person having been supplied, and having the ability to use the water, and *then* being deprived of it, and if after this Act is passed he is then deprived of it, he still continues to be liable. Counsel relies upon the opening words of the section as having that limiting effect. The section runs in these words:—"If any person who is supplied with water by the Board or local governing body having the care and management of the works for the supply of water refuses or neglects to pay on demand any rate charge or sum due under the *Water Acts* then the Board or local governing body may cut off any of the pipes or means by or through which water is supplied by the Board or local governing body to such person or for his use and may cease to supply him with water so long as such rate charge or sum remains unpaid, and neither such cutting off of pipes or means nor the cessation of such water supply as aforesaid shall relieve any person of his liability to pay water rates during such period of cessation." Supposing, with reference to the cutting off of water, that that was an illegal act, and a matter of complaint before the Act was

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passed, I do not think that this Act could be held to validate the *past* cutting off so as to deprive a person of his relief for a past cutting off. I think the language used has nothing of a retrospective character in it. It purports to give a new power, or if not a new power, it contemplates the exercise of a power from the time of the passing of the Act, and does not deal with the exercise of that power before the Act came into force, and it is in its first words exclusive of, or shutting out the present case, "if any person who is supplied with water." This person was not supplied with water, except in the sense that counsel referred to, that he could have had it after the passing of the Act, although he was not, in point of fact, supplied. But the Act is dealing with facts, not with obligations to pay for the water, and I think that, on regarding its strict language and its general intention, it confers a new power and creates a new obligation which did not exist before when a similar thing had been done. It says, in effect, where a man has been cut off from water supply, inferentially he was not under a liability to pay, but we shall provide that you may cut off and the liability to pay will continue, and I think, on the strict interpretation of the Act, that this case does not fall within it. I do not think the consequences of such an interpretation are absurd, although I was inclined to think, at first, that it would be absurd for the authority to go into the house, turn on the supply for five minutes, and say—"Mr. Martin, you are supplied with water; will you pay? If you do not, we will cut off," and if he does not, that they should then cut off. I do not think that would be an absurdity. A man knows he is under a liability, and is deprived of something the use of which would be advantageous to his property, and he knows that, while he labours under that disadvantage, he is not under any liability to pay. I do not think that it is absurd that the Act should provide that, before he comes under the responsibility to pay for that of which he is deprived, he should be by some act made aware of that state of things, and some sort of election given to him to consider whether he will pay or not. So that, although it might be considered a strict interpretation of the section, and one I was not in favour of at first sight, on fuller consideration I think it is the right one, and does not involve absurd or unjust consequences. I there-

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fore make the order absolute on the first ground. As to the second, it is not necessary to decide it, but I have considered it, and am against it. The order will be absolute on the first ground, with costs.

Order absolute.

Solicitors for complainants: *Grano*, Ararat.

Solicitors for defendant: *Williams & Matthews* (for *Webb*, Ararat).

W. H. M.

GRAVES *v.* ROTH.

MADDEN, C.J.
1904
July 27.

Licensing Act 1890 (*No.* 1111), *ss.* 134, 165, 193—*Sunday trading—Obligations of licensee—"Sale" or "barter" of or "traffic" in liquor—Admissions by accused person—Statement in presence of accused—Evasive denial by accused—Evidence—Hearsay—Admissibility—"Licensed premises"—Yard of hotel—Appeal under Licensing Act* 1890—*Amendment of charge on appeal.*

In a prosecution under sec. 134 of the *Licensing Act* 1890 evidence was given by a constable that on a certain Sunday he saw a woman coming from the back entrance of an hotel with a bottle containing beer; that he took her back to the hotel and to the licensee (the defendant), in whose presence she said "I got the beer from a man in the yard, and gave him 3*d.* for it;" and that the defendant said, "I did not serve her with any beer. Cannot you let this pass?" The woman was not available as a witness, and no evidence was called for the defence.

Held, that the statement of the defendant was admissible in evidence as an admission, and that consequently the statement of the woman which led up to it was also admissible.

Held, that the yard of an hotel should always be assumed to be part of the licensed premises, until the contrary is shown.

Cairns v. *Peterson* ([1876] 2 V.L.R. (L.) 143) followed.

Held, that the defendant was rightly convicted of a "traffic in liquor on licensed premises" within the meaning of the section.

The meaning of the words "sale," "barter," and "traffic" in sec. 134 of the *Licensing Act* 1890 discussed.

The obligations of a licensee with regard to trading on a Sunday discussed.

Upon an appeal or other application of the kind referred to in sec. 193 of the *Licensing Act* 1890 the Court or Judge has no jurisdiction to alter the charge in the information.

ORDER TO REVIEW.

An information was laid under sec. 134 of the *Licensing Act* 1890 by Licensing Inspector Edwin Graves against the defendant, William Roth, that "the defendant then being a licensed person within the meaning of the *Licensing Act* 1890, and then holding a license for the licensed premises known as the Moonee Valley

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Hotel, on Sunday, the 19th June 1904, a traffic in liquor unlawfully took place on the said licensed premises to a person not being then either a lodger or boarder in such house or a *bonâ-fide* traveller within the meaning of the said Act, contrary to the said Act."

At the hearing of the information on the 6th July 1904 before the Court of Petty Sessions at Fitzroy, the evidence of the constable, set out in the judgment below, which was corroborated by another constable, was given for the prosecution, and also evidence that unavailing efforts had been made to trace the woman referred to.

No evidence was called for the defence.

The defendant, who had previously been convicted of the same offence, was fined 10*l*. with 6*s*. costs.

An order *nisi* to review this decision was obtained on the following grounds:—

(1.) That there was no evidence of the offence charged in the information.

(2.) That if there was any evidence there was none of a "traffic" within the meaning of the *Licensing Act* 1890.

The material part of sec. 134 is set out in the judgment.

Potts for the defendant to move the order absolute.

Meagher for the informant to show cause.

The following arguments are additional to those which appear from the judgment:—

Meagher—"Traffic" in sec. 134 of the *Licensing Act* 1890 is a general term of which "sale" and "barter" are merely special instances. *Webster's International Dictionary* and *The Imperial Dictionary* both define "traffic" to mean "commerce either by barter or by buying and selling; interchange of goods and commodities; trade. This word, like trade, comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent, unless the business of retailing be excepted."

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[MADDEN, C.J. It is quite clear that this Act uses the word "traffic" in relation to retailing.]

In *Devine* v. *Fallon* (*a*), where a man had bought beer on Saturday and called for it on Sunday, Holroyd, J., held that there had been a "traffic" on the Sunday, even if there had been no "sale" or "barter" thereon. In *Connolly* v. *Whitty* (*b*) your Honor held that a second or third offence under sec. 134 is constituted if the defendant is found guilty of a "sale," or "barter," or "traffic" on a second or third occasion after a previous conviction for "sale," or "barter," or "traffic."

[MADDEN, C.J. I should think that every "traffic" would include a "sale" and every "traffic" would include a "barter;" the question is whether the *species* "sale" is taken out of the *genus* "barter."]

It would still remain, although it was a "sale," a "traffic." In *Molyneux* v. *McPherson* (*c*) Holroyd, J., said—"It must be understood that when I say the offence was a trafficking in liquor, I mean on the Sunday alleged; but the offence itself is general, and ought not to have been confined to any particular person. Possibly the traffic could be proved in certain cases, if only one person had been dealt with, or had received a glass of liquor from the landlord." Even if all the informant's proceedings were wrong your Honor would be bound to amend: See *Licensing Act* 1890, sec. 193.

[MADDEN, C.J. All that section means is that "no conviction etc. shall be invalid by reason of any *variance* between the information and the conviction, etc."]

"Or by reason of any other defect in form or substance." In *Hitchen* v. *Phipps* (*d*), Holroyd, J., says, speaking in reference to a similar section—"There are only two kinds of defects—the one in substance, the other in form."

[MADDEN, C.J. Sec. 193 also says "and provided there is evidence to prove *such* offence." The section means that if the evidence supports the offence which has been charged, the Court will sustain the conviction no matter how the information may have been bungled.]

(*a*) [1897] 3 A.L.R. (C.N.) 42.
(*b*) [1895] 1 A.L.R. 105.
(*c*) [1902] 8 A.L.R. 120, at p.121.
(*d*) [1903] 29 V.L.R. 422, at p. 424.

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'ummary Convictions (5th ed.), pp. 194, 195, and *In Ex parte Stewart* (*i*).

'r referred to *Cairns* v. *Peterson* (*k*).]

3 relates only to defects in form or substance in instru-
ore the Court.

N, C.J. You need not trouble about that section.]

1 also referred to the definitions of "Appurtenances"
ilage" in *Stroud's Judicial Dictionary* (1st ed.), at pp.

N, C.J. Counsel for the defendant has left nothing this case that might help his client, still for all that I the decision of the justices is right. The first ground 'r *nisi* is that there was no evidence of the offence charged ormation; and that is put in two ways. First of all it t in this case there is really no evidence at all, because said is that a woman—not upon oath—told a policeman , and afterwards said something in the presence of the ; that the defendant then said all he was called upon . indeed, he was called upon to say anything; and that, that which was stated in the Court below did not o the establishment of a fact or facts from which any erence could be drawn to the disadvantage of the defend- s quite clear that a conviction must be upon evidence— vorn evidence. It is also clear that the prosecution must acts sufficient, with the reasonable inferences which may from them, to make out the offence charged; and, to our system of law, a person accused is not called upon e word up to that point, nor can his silence be invoked n for inferring that the same facts, which would otherwise cient to prove an offence, ought to be deemed sufficient purpose. But, on the other hand, according to our law, when once the prosecution establishes such facts ner with the reasonable inferences which may be drawn n, *primâ facie* warrant the conclusion of guilt, then the the accused person becomes very much more important;

88] 14 V.L.R. 317, *in argu-* (*k*) 2 V.L.R. (L.) 143.
ndo, at p. 321.

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and the facts and the inferences which may be drawn from them become a great deal more potent because he, who might dispose of them altogether if untrue, says nothing.

These are two aspects of the case which one ought not to forget, because they are commonly involved in dealing with criminal matters. In the present case what happened was this: The constable says in his evidence that "On Sunday morning, the 19th June, I saw a woman coming from the back entrance of the Moonee Valley Hotel." That particular statement of fact is not without obscurity, but I should say it would warrant anyone in concluding, and would induce most people to conclude, that he meant the woman was coming from the back entrance of the hotel after having passed through it. It is said that that was meant merely to indicate the particular direction from which she was coming, but I do not think that most people would think that that was meant, or that that meaning could reasonably be inferred from that statement. The evidence of the constable then goes on—"She had a bottle in her hand containing liquor. I smelt it and found it contained beer. I took the woman back to the hotel and to the defendant, and she said in the defendant's presence—'I got the beer from a man in the yard and gave him 3*d*. for it.'" It is said as to that that when that statement was made the defendant was not called upon to make any answer to it, and I think it is true that if he had remained absolutely silent it would have been extremely difficult to have made out any evidence against him, unless the woman had been called to give evidence against him. In this case the woman was not called, not being available for the purpose, and had he remained silent I think that nothing could have been proved against him. But the evidence of the constable goes on to say—"The defendant said, '*I* did not serve her with any beer.' The woman would not say that she got the beer from the licensee. I have not seen the woman since. Before leaving the hotel defendant said to me 'Can't you let this pass?' I said that the matter would have to be reported in the usual course."

As to the admissibility of the evidence, I think that none of the evidence would have been admissible if the defendant had not himself said something, and said something which was sufficient

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to warrant the justices in drawing a conclusion adverse to him, and probative of the alleged charge, from what he said; because the only admission which could affect him would be an admission made upon sworn testimony — what the constable swore the defendant had admitted. I think, therefore, that what the defendant said was certainly admissible evidence; and that what the woman said to him, which induced that admission, was admissible evidence because it led up to it, so to speak—it was a sort of rhetorical question to him to which he gave an answer.

Then it is said that, assuming this evidence is admissible, it is for two reasons not effective to support the conviction against the defendant. It is said, first of all, that, assuming the woman did say that she got the beer in the yard of the hotel, there was no evidence that the yard of an hotel is part of the licensed premises. In my opinion, the yard of an hotel should always be assumed to be part of the licensed premises; and if it be asserted that it is not so, then the party who so asserts ought to prove it not to be so. *Primâ facie*, I should say that the yard of an hotel ought always to be included in the license as part of the premises, and the appurtenances of the premises, and the case of *Cairns* v. *Peterson* (*l*) is very distinct to the same effect.

The evidence, so far, put before the justices the fact that the woman said that on part of the licensed premises—for the justices may reasonably have concluded that the yard was part of the licensed premises—a man had given her beer, and that she had given him 3*d*. for it. The landlord of licensed premises is bound by the principle of this *Licensing Act* to see to it that on Sunday no liquor is disposed of on his premises; that is to say, he is specifically required to close up the bar and to keep it locked and free from access by anybody. He is the person to whom the law looks, and if anybody takes advantage of him and gets the liquor, he is responsible. He is bound to see that there is no liquor available on his premises on that day to be disposed of by anybody; and in point of fact, if liquor is disposed of on his premises on that day he must, to avoid responsibility, be in a position to show that somebody maliciously and without his knowledge took liquor other than his on to his premises and disposed of it there. When

(*l*) 2 V.L.R. (L.) 143.

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this statement was made by the woman that she "got the beer from a man in the yard and gave him 3*d.* for it" all that the defendant said was "I did not serve her with any beer." Any publican, who was violating the Act in a most flagrant fashion, might yet say that with perfect safety. If he had any brains at all it is just the sort of thing one would expect he would say, and yet several persons might have been serving in the hotel with his knowledge. If he had been entirely innocent, what he should have said was that the woman was lying in saying that she had ever been in the yard, or that she had got the beer in the yard, or that she had got the beer on his premises. His was a mere pregnant denial, which meant nothing. Then he goes further and says, "Cannot you let this pass?" If he knew that he was innocent of any offence, the proper position for him to have taken up was not to say a word about the matter, but to go to the Court and fight it out. It is said for him that it might have been merely a weak-minded suggestion that he should not be put to any bother about the matter; but still it is a fact which the justices might consider in connection with his pregnant denial of the woman's statement, as leading to the conclusion that, though he himself did not serve her with beer, somebody else had done so with his knowledge, or that he had winked at the disposal of it.

Thus there is evidence which would warrant the justices in coming to the conclusion that he was guilty of some form of disposal. Up to that point he is entitled to say nothing and to say to the prosecution—"When you make out a case against me, I will answer it; but until then I will not say a word." But as soon as a *primâ facie* case is made against him he is bound to speak, and say what the real truth of the case is, unless he be content to let the justices draw inferences of guilt against him; and the case, when once established *primâ facie*, becomes much stronger when he who knows most about it says nothing. Therefore, I think that, the evidence being admissible that the woman got the beer on the licensed premises, and that the defendant, being told of it, evaded the question and did not say all he might have said, and did not indeed say what he was bound to say—namely, that he had taken every possible precaution to prevent liquor being

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disposed of, and that if it was disposed of it must have been done maliciously by some person who had brought the liquor to the premises unknown to him—the justices were justified in finding as they have done.

Then it is said that what is charged here is that there was a "traffic in liquor," whereas in fact the evidence (if any) is that there was a sale of liquor. Sec. 134 of the *Licensing Act* 1890 says:—"Every licensed person on whose licensed premises any sale or barter of or traffic in liquor takes place or on which any liquor is drunk on Sunday except by lodgers or by *bonâ-fide* travellers shall for a first offence be liable to a penalty, etc." Everybody knows that publicans keep liquor for the purpose of selling it, and if liquor is disposed of it is very probable that the liquor has been sold. But, nevertheless, if a publican be sufficiently acute, it might be a difficult thing to prove that a sale has taken place, because a sale means a transmission of property for a consideration, and although you could perhaps prove the transmission easily enough, you might not be able to prove the consideration. And although in ninety-nine cases out of every hundred the consideration for the transmission of liquor would be money, it would be difficult perhaps in some particular case to prove it. All kinds of excuses might be set up, and it might be said that goods of some sort had been exchanged for the liquor. The Legislature therefore say that, if the liquor has been bartered for, that is sufficient. The Legislature, therefore, makes either a sale or a barter an offence. But still the circumstances might be such as that they show neither a sale nor a barter and yet there is a disposal of liquor on the premises. Consequently the Legislature has said—"Prove a sale of liquor if you can; prove a barter of liquor if you can; and, anyway, if you can prove a traffic in liquor that is sufficient."

In the present case that which the prosecution could be sure of was this—that there was a disposal of beer on a Sunday on the licensed premises to this woman by somebody unknown, and whose relation to the licensee was unknown and could not be established. The woman said that she gave this man 3*d*., and if the woman had been called as a witness at the hearing there would have been evidence of a sale. The woman was not there to state that on oath, but there was the admission of the defendant

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by his saying that if she had got that beer on the premises he did not supply her with it, and by his asking that the matter be "passed by." In these circumstances all that could be proved on oath, or the only inference of fact that could be drawn, was that there was a disposal of liquor on the premises by somebody. That being so the magistrates could only fall back on the evidence of a traffic, because nothing else could be established unless by the evidence of the woman. I think that the justices were at liberty to draw the inference they did, and were right in convicting as they did.

My attention has been drawn to secs. 165 and 166 of the *Licensing Act* 1890. Sec. 165 says that "the delivery of any liquor by a licensed victualler or by the owner or occupier of any house or place or by his or her servant or other person in any house or place shall be deemed to be sufficient *primâ facie* evidence of money or other consideration having been given for such liquor so as to support a conviction unless satisfactory proof to the contrary be given." That merely goes to this, that if a man is charged with a sale the prosecution would be so far helped that the mere disposal of liquor would connote a sale without proving the passage of money. Sec. 166 is in the same direction. But if a prosecution says—"There may be a sale, but we are unable to say anything about it, but we can prove a traffic," they would be entitled to do so. I cannot disturb the decision of the justices. I discharge the order *nisi* with costs.

Order nisi discharged.

Solicitor for the informant: *Guinness*, Crown Solicitor.
Solicitor for the defendant: *Potts*.

H. I. C.

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[PRACTICE COURT.]

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Mines Act 1890 (*No.* 1120), *s.* 5—*Miner's right—Right to possession of land under miner's right where no by-laws have been made—Tailings site—Mines Act* 1897 (*No.* 1514), *s.* 53 (1)—*Forfeiture of tailings.*

By sec. 5 of the *Mines Act* 1890 (No. 1120) it is provided that "Any person who shall be the holder . . . . of any such miner's right shall subject to the provisions of this part of this Act and to the by-laws to be made as hereinafter mentioned be entitled . . . . to take possession for gold-mining purposes of a parcel or so many parcels as such by-laws shall permit of Crown land. . . ."

Held, that the holder of a miner's right is not entitled to take possession of any land until appropriate by-laws have been made.

It was provided by a by-law that any miner should be at liberty to hold possession of any quartz, earth, timber, or other substance that may have been stacked by him or of which he is the owner, and might register such substance with the mining registrar.

Held, that such by-law did not upon registration of the substance referred to confer a holding title to the site upon which the materials were stacked.

Sec. 53 (1) of the *Mines Act* 1897 provides for the forfeiture of tailings left upon land comprised in a lease even though such tailings were not placed there during the currency of the lease.

SPECIAL CASE stated by the Warden of the Goldfields at Tarnagulla.

The special case was stated as follows:—

This case was commenced by summons dated 5th February 1904, by which the complainant, Frederick William Bestman, sought by virtue of his miner's right, and also by virtue of his application No. 4956, Maryborough, for a gold-mining lease, to have it declared that the defendant, Andrew Mitten, trespassed on certain Crown lands situate at Llanelly included in an application for a gold-mining lease by the complainant, which land was marked out by him for such application on the 13th July 1903, and since that date up to the present time the application has been pending, such trespass by the defendant being the marking out and registration by defendant, on the 5th January 1904, of the said substance as quartz tailings in contravention of the *Mines Acts*, and of clause 85 of the Maryborough Mining By-Laws, number 4.

And the complainant seeks it to be declared:—

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(*a*.) That the defendant is in illegal occupation of the said land. Defendant claims to be in occupation under a certain registration dated 5th January 1904, under clause 85 of the Maryborough Mining By-laws.

(*b*.) That such registration by the defendant was illegal, inasmuch as such quartz tailings, referred to in the registration, had not been raised, stacked, or stored by defendant, nor was defendant the owner thereof.

And the complainant further seeks an order that such registration be cancelled, and that he be put in possession of the land comprising same.

The summons came on for hearing before me on the 23rd February, and the 4th and 14th March, 1904, both parties being represented by counsel.

The following are the facts given in evidence, and admitted by both parties:—

On the 3rd day of October 1892, the defendant, Andrew Mitten, obtained from the Crown, under the *Mines Act* 1890, a lease for quartz gold mining, No. 3514, consisting of 8 acres 3 roods and 7 perches of Crown lands at Llanelly, in the State of Victoria, and held such lease continuously from then until the 22nd day of June 1900, when such lease was declared void by the Crown for non-compliance with the covenants therein expressed.

For years prior to and on the 22nd day of June 1900, the date of the said voidance, a large quantity of tailings was left lying on the land comprised in defendant's lease.

The defendant Mitten did not remove, work, or treat the tailings from the date of the declaration of voidance of the lease, on the 22nd day of June 1900, until the date of issue of the complaint herein, viz., 5th February 1904; the defendant Mitten did not raise, stack, or store the tailings.

About thirty years ago one Bousfield had a battery site on part of the land comprised in the said lease No. 3514, and he had a battery thereon, in which he crushed quartz for the public and for himself, which crushing produced the tailings above-mentioned.

On the 26th February 1876, Thomas Comrie, of Tarnagulla, took from Bousfield a bill of sale over the machinery on the said battery site, but no mention of the tailings, or of sand or *débris*.

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was made in the bill of sale, but the bill of sale contained a general clause intending to include in the said bill of sale all other the chattels and effects, matters, and things then upon or thereafter to be brought upon the said site during the continuance of the bill of sale.

Comrie entered under the bill of sale and took possession of the machinery specifically mentioned thereon, and also other chattels, including the sand thereon, and for some time let the battery on hire, and on the 3rd day of July 1897 sold all the sand and *débris* belonging to him on the said lease to the defendant Mitten and one R. Allen, for the sum of 5*l*. The defendant Mitten registered the said tailings on the said lease with the mining registrar at Tarnagulla, in 1897, under clause 85 of the Maryborough Mining By-laws, and, with one or two breaks in the continuity of re-registration, held possession of the tailings and the site thereon until the 4th day of July 1903, on which day he renewed his registration under clause 85 for a further period of six months, and has occupied such site ever since.

On the 13th July 1903, the complainant, Bestman, who is the holder of a miner's right at all times material to this complaint, marked out in accordance with the *Mines Acts* and mining regulations a lease of the Crown land on which the tailings were situated, and applied for same in accordance with the regulations, and such application for a lease previous to this complaint was recommended by the Warden, subject to consideration of the interests of defendant and others, and is now pending, and the Mines Department has requested the said complainant to clear his title prior to the granting of the lease to him.

Prior to Christmas 1903, the defendant Mitten met the mining registrar in the street in Tarnagulla, and asked him to keep good his registration of the said tailings under clause 85 when it expired, but he did not give the said registrar the fee fixed by the by-laws for such renewal until after 5th January 1904.

The office of the mining registrar for registration under the Maryborough By-laws for the Tarnagulla division is in Tarnagulla.

Mitten did not on the day of or the day before the expiration of the said registration of the 4th July 1903 request the mining

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registrar to renew same, neither did defendant at any time produce to the registrar his miner's right for that purpose.

The mining registrar renewed defendant's registration of the said tailings on the 5th January 1904, two days after the previous registration expired, and Mitten posted a copy of such re-registration and his ownership on the tailings about a fortnight after.

At the close of the evidence for the defendant, Mr. Nolan, who appeared for the defendant Mitten, contended that there was neglect on the part of the mining registrar in renewing the registration of the 4th July 1903, and, therefore, defendant could take advantage of clause 91 of the by-laws.

Furthermore, that the doctrine laid down in the case of *Vial* v. *Allender* (*a*) applied to the registration, and therefore his client's registration and holding was a good one.

Mr. Luke Murphy, for the complainant, said it was admitted that the defendant did not raise, stack, or store the tailings, and as the defendant had not worked or treated the tailings from the date of voidance of the lease on 22nd June 1900 to the present time, he forfeited any ownership he may have had in the tailings by virtue of sec. 53 of the *Mines Act* 1897.

That being so, defendant did not raise, stack, or store, or own the said tailings, and his registration for same under sec. 85 was bad.

He further contended that Comrie had no title in the tailings to sell to Mitten, and therefore Mitten was not the owner.

And further, that, assuming defendant was the owner of the tailings, it was his duty to come into the office of the registrar on the day of or day prior to the expiration of the registration of the 4th July 1903, and to pay his fee for re-registration, and as defendant only met the registrar in the street some weeks prior to the expiration of the said registration, there was no neglect on the part of the mining registrar by which defendant could take advantage of clause 91 of the by-laws.

He also finally submitted that complainant—(1) as the holder of a miner's right, and (2) as the applicant for a mining lease now pending, was entitled to an adjudication—(*a*) That the registration under clause 85 of the by-laws should be cancelled; (*b*) that

(*a*) [1898] 4 A.L.R. 17.

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defendant be deemed a trespasser and in illegal possession of the tailings and site on which they are located.

I was about to find a verdict for the defendant, but before making any record of my decision I agreed, at the request of complainant's counsel, to state the following questions of law for the opinion of the Supreme Court:—

1. Had Comrie such a title under his bill of sale that the purchase from him by the defendant Mitten of the tailings constituted defendant an owner within the meaning of clause 85 of the Maryborough Mining By-laws (*b*).

2. Was there such or any neglect by the mining registrar under clause 85 of the by-laws as to enable defendant to take advantage of clause 91 of the same by-laws?

3. Did the tailings twelve months after the voidance of the lease on the 22nd day of June 1900, by virtue of sec. 53 of the *Mines Act* 1897, become the absolute property of the Crown?

4. Can the defendant, by virtue of his miner's right alone, hold possession of the tailings and site on which same are situated against the said complainant herein?

(*b*) Maryborough Mining District, By-law No. 4.

Sec. 84. Protection to sites, water dams, residence areas, etc.—Persons in legal possession under this by-law of any site for crushing machinery water dam race reservoir tramway or site for stacking quartz earth or other materials or for any residence area shall be protected in possession of such holding against any other parties except in the event of such site or area being required for mining purposes; and in such cases the persons requiring such site shall make application to a Court of competent jurisdiction, etc. (prescribing procedure therefor).

Sec. 85. Quartz, earth, timber, and other substances may be stacked and registered.—Any miner or miners shall be at liberty to hold possession of any quartz earth timber or other substance that may have raised stacked or stored by him or them or of which he or they may be the owner or owners provided that the same shall not have been stored on any ground legally occupied by any other person and may register such substance with the mining registrar in accordance with Schedule XI. hereunto annexed and shall keep a copy of such registration posted on the stack or store and such registration shall not hold good for a longer period than six months unless renewed at the end of that period.

Schedule XI.—I hereby certify that I have this day at the hour of o'clock registered for protection for a term of months from the date hereof the belonging to and stacked by at under the provisions of sec. 85 of the by-laws of the Maryborough Mining District. Miners' rights, No. Date

Dated at this day of 18

Mining Registrar.

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5. I held that there was evidence of defendant's ownership in the tailings within the meaning of clause 85 of the by-law at the time of the various registrations under that clause, and that over and above or failing any other title he may have had by right of purchase, such ownership was acquired by him by his having taken possession thereof by virtue of his miner's right.

Was I right in so holding?

6. I held also that since the coming into force of the Act No. 1514 (*Mines Act* 1897) there were other modes than under sec. 53 of that Act of becoming possessed of and working tailings which are not claimed by others, and which may or not be the absolute property of the Crown.

Was I right in so holding?

W. WENTWORTH GREENE,
Warden.

Dated this 12th day of April, 1904.

Questions 5 and 6 were added by the Warden after the solicitors for the parties had agreed upon and completed the special case.

Barrett for the complainant.

Starke for the defendant.

Cur. adv. vult.

HOOD, J., read the following judgment:—The first matter to be considered in this case is whether or not the holder of a miner's right is entitled to possession of any land under sec. 5 of the *Mines Act* 1890 until appropriate by-laws have been made, and in my opinion he is not The section gives the right subject "to the by-laws to be made as hereinafter mentioned." The land to be taken is such parcel or parcels "as such by-laws shall permit." The parcels are to be "of such quantity and dimensions and with such boundaries as shall be directed by such by-laws," and such dimensions and boundaries are to be fixed at the time of taking such possession, or at some subsequent time "as shall be by such by-laws directed." It seems to me therefore clear that the making of by-laws is a condition precedent to the taking possession of any land. It was contended that, in the absence of any fit by-law,

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the holder of a miner's right was entitled to take possession of any unoccupied Crown lands to any extent. Not only would this be unworkable, but it is also opposed to the words of sec. 5. This point appears never to have arisen for determination, but in *Bannerman* v. *Sexton* (c) Higinbotham, C.J., said—"The powers given under a miner's right are clearly stated and defined in sec. 5 of the original Act. Power is given to carry on all the occupations of mining, under a miner's right, on the piece of land authorized to be occupied by the owner." That appears to me to be a reference to the authority by by-law, and to bear out what I think is the clear meaning of the section.

The next question is as to the effect of the by-laws of the Maryborough Mining District. It was argued that those by-laws provide for the taking up of what has been called a tailings site. The clauses relied upon are 84 and 85, and the wording of each is peculiar. The former starts by saying that—"Persons in legal possession under this by-law" of any site "for stacking quartz earth or other materials" shall be protected in possession of such holding. This assumes that somewhere or other legal possession is provided for under the by-laws, but there is no provision for such a site *per se*. Clause 85 may have been intended for this purpose, but if so it does not accomplish that end. It merely provides that a "miner or miners shall be at liberty to hold possession of any quartz earth timber or other substance that may have been raised stacked or stored by him or them or of which he or they may be the owner or owners," provided that the same is not stored on any ground legally occupied by any other person—a superfluous provision. It may be, as was suggested, that some words have been omitted, and that this really was intended to preserve the site on which the materials were stacked, and not the materials, which are already the property of the miner. But, to carry out that intention, it would be necessary to insert several words which are not there, and the Court is not justified in going that length in pursuit of a possible intention, with the effect of altering the whole meaning of the clause. Such a course would be, in effect, making the clause, and not merely interpreting it. It is also to be noticed that no boundaries, or dimensions, or limita-

(c) [1890] 16 V.L.R., p. 602.

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HOOD, J.
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tions of any sort are referred to, and the registration is a registration of the substance, and not of the site, though the form in the schedule contemplates that the locality should be named. The effect of registration or of non-registration is not defined, and though I think it is possible that Clause 85 was meant to confer a holding title upon registration to the site upon which the materials were stacked, I cannot say that the clause, as it stands, has that operation, and I was not referred to any other clause that could have that effect.

I have now to consider the interpretation of sec. 53 (1) of the *Mines Act* 1897. That section provides for the forfeiture of tailings left upon land comprised in a lease which has terminated under certain circumstances. Does such forfeiture apply to all tailings belonging to the lessee, even though such tailings were not placed there during the currency of the lease? I think that it does. The words used are very general. If "the lessee thereof leaves upon the land comprised in such lease any tailings," such tailings are to pass to the Crown. The object of the Legislature seems clear. It was feared that by allowing a lessee to leave tailings on land after the termination of his lease he would be enabled to keep the land idle. He is accordingly given twelve months as a right, or such further time as the Minister may allow, to treat or remove the tailings, and if he does neither, he loses his right to them. There can be no reason for limiting this to tailings acquired at any particular time. The evil sought to be remedied is not affected by the time when the lessee placed the tailings on the land, and so, in my opinion, all of his property passes.

These conclusions enable me to answer the various questions submitted by the Warden—

No. 1.—Comrie's bill of sale probably would include the tailings in question, but much would turn on its precise language, which is not set out. But so far as the ownership of the tailings is concerned, the bill of sale appears to be immaterial, inasmuch as the possession of them by the defendant is *primâ facie* evidence of ownership.

No. 2.—I do not see any evidence of any neglect by the registrar, and the registration appears to have been in due time. If, however, there was a delay, clause 91 would protect the defendant's rights if he has any.

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No. 3.—Yes.

No. 4.—No.

No. 5.—This would be right except for the last words, and apart from the effect of sec. 53 (1) of the *Mines Act* 1897.

No. 6.—I do not understand this question, and counsel were unable to throw any light upon it.

The defendant must pay the costs of this special case.

Questions answered.

Solicitor for complainant: *R. H. Rodda* (for *Luke Murphy*).

Solicitor for defendant: *J. H. Hewison* (for *Nolan & Hogan*).

W. H. M.

THE KING *v.* AUSTIN.

A'BECKETT, J.
1904
March 23, *May* 4.

Crown—Costs—Power to award costs against the Crown—Crown Remedies and Liability Act 1890 (*No.* 1080), *Part I.—Information by the Attorney-General—Order for costs made without jurisdiction—Taxation.*

There is no power to order the Crown to pay the costs of a successful defendant in an information by the Attorney-General under Part I. of the *Crown Remedies and Liability Act* 1890.

N.F.R. v Atkinson (1905) V.L.R. 695.

Where such an order had been erroneously made on the hearing, and there had been no appeal,

Held, that the defendants were entitled on taxation of their costs to be allowed as against the Crown such costs, charges, and expenses as had been reasonably incurred in connection with a commission to take evidence in England, and that these included the costs of proceedings before the English Courts for the determination of questions arising during the taking of evidence under the commission.

SUMMONS.

This was a summons to review the decision of the taxing officer on a matter which arose during the taxation of costs in the case of *King* v. *Austin* (*a*). That case was an information by the Attorney-General under the *Crown Remedies Liability Act* 1890, Part I., for the recovery of certain debts alleged to be due from the defendant to the Crown under the *Administration and Probate Act* 1890. On the trial A'Beckett, J., gave judgment for the defendant, with costs against the Crown. A commission had issued to examine certain witnesses in England, and a question

(*a*) [1903] 29 V.L.R. 82.

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of privilege raised on behalf of one of the defendants as to the production of certain books before the commission had been fought in the English Courts, going eventually to the House of Lords, where it was decided in favour of the defendants.

Costs of these proceedings were not dealt with by the House of Lords, and counsel for the informant during the taxation of defendants' costs before the Victorian taxing officer objected to their allowance as part of the defendants' costs. The taxing officer disallowed the objections, stating his reasons as follow:—"These objections relate to the costs of a commission to examine witnesses in England. I have in the exercise of my discretion allowed as against the Crown informant such costs, charges, and expenses as appear to have been fairly and reasonably incurred in connection with the said commission or of or incidental thereto as between party and party. Costs of a commission are in general costs of the cause, and it appeared to me that the proceedings before the House of Lords arose out of the commission to examine witnesses in England, and so were part of the necessary costs of litigation. I would refer to the judgment of the House of Lords and particularly to the observation of Lord Davey that 'the Victorian Courts may consider it part of the costs of the litigation—I do not know.' Generally as to the costs of a commission to examine witnesses, I would refer to *Marshall on Costs* (2nd ed.), pp. 59, 279, 280; *Gordon on Costs*, pp. 139, 140; *Pridmore's Guide to Costs* (10th ed.), p. 29; and to the following cases:—*Cornet* v. *Dempsey* (b); *Potter* v. *Rankin* (c); *Yglesias* v. *Royal Exchange Assurance Corporation* (d)."

Weigall for the Crown.

Hayes for the defendants.

The arguments appear sufficiently from the judgment.

Cur. adv. vult.

May 4.

A'BECKETT, J., read the following judgment:—Summons to review taxation. I gave judgment for the defendants, with costs,

(b) [1841] 1 Dowl. N.S. 422; 6 Jur. 86.
(c) [1868] L.R. 4 C.P. 76.
(d) [1878] L.R. 5 C.P. 141.

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as reported in *The King* v. *Austin* (*e*). Part of the costs incurred by the defendants were in relation to a commission sent from the Court to take evidence in England. One of the defendants raised a question of privilege as to certain books which he declined to produce. Matthews, J., ordered their production. His order was confirmed on appeal in *The Queen* v. *Bullivant and Others* (*f*), but the order was set aside on further appeal to the House of Lords: *Bullivant* v. *The Queen* (*g*). The costs of these proceedings were not dealt with by the House of Lords. The taxing officer here allowed them. The grounds of objection to allowance argued before me were based on the refusal to allow in England. The costs were not given there, on the ground that costs could not be given against the Crown. This was the view acted upon by the English Court of Final Appeal, which heard a special application as to costs not reported. A copy of the shorthand writer's notes was used before me, where the observations of the Lord Chancellor and other law lords will be found. Our *Crown Remedies Act* was referred to, and it was pointed out that while under Part II., "Mode of enforcing claims against the Crown," it is provided that costs may be given as between subject and subject, Part I., "Recovery of debts and property by the Crown," contains no similar provision, but sec. 18 provides that Her Majesty shall be entitled to full costs of suit in all cases in which a plaintiff in any civil action between subject and subject would be entitled thereto. *The King* v. *Austin* was an information under Part I. The judgment of the Lords was delivered by the Lord Chancellor, according to the reporter's note, in the following words:—"I think we are of opinion that we can make no order as to costs. If the parties applying here can get them in Victoria, let them. We desire to express no opinion one way or the other, but I think we must make no order." According to the view which was acted upon by the English Court, I had no power to make the order I made against the Crown. The point was not raised before me when I gave my decision. The argument for the Crown then assumed that I had the power. I have been referred to prior decisions of the Full Court, where costs were given against the

(*e*) 29 V.L.R. 82.
(*f*) [1900] 2 Q.B. 163.
(*g*) [1901] A.C., p. 196.

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THE KING v. AUSTIN.

Crown in similar cases—*The Queen* v. *Buckley Swamp Company* (h) and *The Queen* v. *Gidney* (i). The question I have now to decide is not whether my former judgment was right, but whether the costs of the proceedings in question are costs to be taxed and paid within the meaning of that judgment. I decide that they are. I think I have no discretion in the matter. I ought not to decide that because the judgment was wrong, or the course pursued in England to obstruct inquiry was discreditable, the costs of it should not be included as costs in the action. As the objection to the jurisdiction is now taken with reference to the proceeding before me, I shall not give any costs of this summons. I give leave for either party to appeal.

Solicitor for the Crown: *Guinness*, Crown Solicitor.
Solicitors for defendant: *Harwood & Pincott*.

J. M.

MADDEN, C.J.

1904 *July* 10.

In re the Estate of JOHN KERR.

Probate practice—Administration and Probate Acts, 1890 (*No.* 1060), *s.* 14; 1892 (*No.* 1261), *s.* 14—*Application to compel executor to bring will into Court—Jurisdiction to grant summons—"Probate Rules of* 1854," *applicability of—Affidavit in support, necessity for—Probate and administration fees—Insufficiently stamped summons.*

The practice upon an application for a summons under sec. 14 of the *Administration and Probate Act* 1892 (No. 1261) is regulated by the "Probate Rules of 1854," and therefore there is no jurisdiction to grant such application without an affidavit of facts as prescribed by rule 4 of such rules.

The fees prescribed by rule 23 of the "Probate and Administration Rules 1900" and the Second Schedule thereto must in all cases be demanded and paid.

Held, therefore, that a summons under sec. 14 of the *Administration and Probate Act* 1892, to which was affixed a stamp of less value than the fee prescribed by such schedule, was not properly issued.

SUMMONS under sec. 14 (*a*) of the *Administration and Probate Act* 1892, calling upon Richard Brown, generally known as Richard

(h) 17 V.L.R., p. 19; 18 V.L.R., p. 657.

(i) 24 V.L.R. 795; 25 V.L.R., p. 81.

(*a*) *Administration and Probate Act* 1892 (No. 1261), sec. 14:—"In any case where the executor named in a will or any person having possession of any will shall neglect to bring into Court such will within six weeks from the death of the testator or where the executor named therein shall neglect to prove the same or renounce probate

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Kerr, of Bendigo, the executor named in a document purporting to be the last will, dated the 9th day of May 1904, of John Kerr, late of Bull-street, Bendigo, in the State of Victoria, plumber, deceased, to attend the Judge in Chambers on the hearing of an application on the part of Eliza Mary Stirton, of Golden-square, Bendigo, married woman, a niece of the said deceased, and as such interested in his estate, that the said Richard Brown do show cause why he should not bring into Court such will or why he should not prove the same or renounce probate thereof, or in the alternative why administration of the estate of the said John Kerr, deceased, should not be granted to the said Eliza Mary Stirton.

Wasley in support of the application.

Bryant to oppose—There are two preliminary objections. The first is that there were no proper materials before A'Beckett, J., when he granted the summons, and he therefore had no jurisdiction to grant it. The application for the summons should have been supported by an affidavit, but it appears that the summons was simply shown to His Honor, and he then signed it. At any rate, there is no affidavit upon the file in the office of either the Prothonotary or the Master in Equity. Without any evidence before him, a Judge cannot possibly say, for example, whether there is any will or any executor in possession of the will, or whether such executor has renounced probate or not. It is not merely a matter of the Judge's discretion; but the section makes the *primâ facie* establishment of certain facts a condition precedent to the issue of the summons. Further, these facts should be verified

thereof within six weeks from the death of the testator any party interested in such will or in the estate or the Curator or any creditor of the testator may apply to a Judge of the Supreme Court in Chambers for a summons calling upon the executor or any person having possession of such will to show cause why he should not bring into Court such will or why such executor should not prove the same or renounce probate thereof or in the alternative why administration with such will annexed should not be granted to the applicant and upon proof of service of such summons if the executor or such person do not appear or upon cause being shown it shall be lawful for any Judge of the said Court to make an order upon such executor to bring such will into Court and make such order in the premises and as to costs as shall appear just and the Court may grant administration of the estate to such applicant."

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on oath, for the reason that the person showing cause should know definitely what case he has to meet, and for the reason also that there may be no possibility of an entirely new case being put forward by the applicant upon the return of the summons. Moreover, as there is no practice provided by the Act No. 1261, under sec. 14 of the *Administration and Probate Act* 1890, the practice is regulated by the practice of the Court in its ecclesiastical jurisdiction previous to January 1873—that is, by the "Probate Rules of 1854." *Cf.*, on this point, *In re Owen, Exparte White* (*b*) and *In re Elliott, Exparte Daff* (*c*). Rule 4 of these rules is in effect substantially the same as sec. 14 of the Act No. 1261, with the exception that no mention of an affidavit is made in the section. The rule provides that when an application for a summons is made an affidavit should be made setting forth—(1) the death of the testator; (2) the existence of his will; (3) that the parties against whom the summons is sought to be issued are appointed executors of the will; and so forth. Such an affidavit was essential, therefore, to give the Judge jurisdiction here. The second objection is that the summons has only a 1*s*. stamp affixed to it, whereas the Second Schedule to the *Probate and Administration Rules* 1900 provides that "on every writ or summons under Act No. 1261 section 14" a 10*s*. 6*d*. fee should be payable. The summons was therefore never properly issued.

Wasley—Sec. 14 of the Act No. 1261 takes the place of rule 4 of the "Probate Rules of 1854," and is very much in the same terms. One marked distinction is that under the latter the application used to be made to the Court, before which certain materials had to be brought, whereas now under the former the application is made to a Judge in Chambers, and therefore need not be in such a formal manner. It has been decided by the Full Court that it is not even necessary for the Judge in Chambers to issue a summons, but that his Associate may do it. Under sec. 50 of the *County Court Act* 1890, which is a somewhat similar enactment to section 14 of the Act No. 1261, a summons is issued without any affidavit verifying the facts upon the establishment of which the action is to be remitted. Sec. 14 of the *Administration and Probate Act*

(*b*) [1892] 19 V.L.R. 1. (*c*) [1899] 5 A.L.R. (C.N.) 46.

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1890 says that the old practice is to be in force "except when otherwise provided," and the Act No. 1261 does otherwise provide by providing that the application is to be made to a Judge in Chambers and not to the Court. It provides a rough and ready mode of doing the same thing as was formerly done under the old rules. It is always open to the respondent to go to the Judge and get the summons set aside on the ground that the Judge has acted inadvertently, or for any other reason. For all that appears to the contrary, evidence may have been given *vivâ voce* and on oath before the Judge. As to the stamp, all that rule 23 of the "Probate and Administration Rules 1890" says is that "the fees specified in the Second Schedule *may* be lawfully demanded by the officers of the Court"; while in contradistinction to this rule 24 says that "the fees mentioned in the Third Schedule hereto *shall* be taken by and are hereby made payable." If there is no jurisdiction, no costs should be allowed.

[MADDEN, C.J. The respondent has a right to come here and raise these questions, and point out his rights. It is not like a case where there is no jurisdiction over the subject-matter. There is abundant jurisdiction over the subject-matter here.]

MADDEN, C.J. I am inclined to think that the contentions for the respondent on both these points are right. Sec. 14 of the *Administration and Probate Act* 1892 (No. 1261) prescribes a new right—new as far as that period of the Ecclesiastical Court's history is concerned, though in 1854 a somewhat similar practice had already prevailed and had dropped out. At all events, sec. 14 gives the right to have an executor, who is in possession of a will and has not proved it or renounced probate of it within six weeks from the death of the testator, brought before the Court to compel him to take out probate, or to abandon it and let someone else take out administration with the will annexed.

Now, that, I think, is a different position altogether from one of the ordinary incidents in daily practice, where a Judge, or, indeed, his Associate, for the sake of convenience, issues a summons in an action as a matter of course. The reason for that is that a writ has already been issued and served, and the action has commenced, and the Court is then entitled, and indeed bound, for the

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purity and rectitude of its own process to see that nobody abuses that process. The consequence is that summonses to amend pleadings, to amend writs, to strike out matters that are improper, and so forth, which are all dependent upon the Court's duty and right to protect its own process, are issued as of course; but as soon as you come to a new jurisdiction altogether—the Ecclesiastical jurisdiction—the practice of which depends upon different circumstances and has a different origin from the ordinary practice of the Court in other jurisdictions, one is bound to observe the conditions which are prescribed, or which appear to be prescribed, for the exercise of any branch of practice in that particular jurisdiction. Now sec. 14 of the Act No. 1261 indicates a series of conditions which must be existing before the right arises, and before the Judge can be called upon to issue a summons. How is the Judge to know whether those conditions exist or not? If he does not know, he ought not to issue the summons. If he wants to know, he must be supplied with evidence.

In the present case there is no evidence, or suggestion, or pretence that any formal evidence was placed before the Judge upon obtaining this summons. Apparently the summons was submitted to him like an ordinary summons, and possibly without any of its special features being brought under His Honor's notice, and he probably signed it as he would an ordinary summons in his ordinary practice. But I think that it is a sound proposition that these facts must be established. If that be so, one is driven back to sec. 14 of the *Administration and Probate Act* 1890, because when anybody wants to get a summons under sec. 14 of the Act No. 1261 he must ask himself, "How am I to get it?" He then looks to sec. 14 of the *Administration and Probate Act* 1890, and that section tells him that where this particular Act has not provided a practice of its own in respect of the Ecclesiastical jurisdiction, then the practice of the Court in its Ecclesiastical jurisdiction which prevailed before January 1873 is to be followed. Then if one looks at the rules which prevailed in the ecclesiastical jurisdiction in 1854, one finds what was done there was to apply to the Court on affidavit, setting out certain statements of fact prescribed in rule 4 of the "Probate Rules of 1854." The result therefore is, as is shown by the cases

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of *In re Owen, Ex parte White* (*d*) and *In re Elliott, Ex parte Daff* (*e*), that an application must still be made, founded for such purposes as this upon rule 4 of the "Probate Rules of 1854," and this prescribes an affidavit and the facts which the affidavit should state. I therefore think that that is the proper practice, and the practice upon which the jurisdiction of the Court depends.

Then there is another objection taken—viz., that, whether there was or was not jurisdiction to issue this summons without evidence, this summons was all wrong, because only a 1*s*. stamp is affixed instead of a 10*s*. 6*d*. one, as provided by the rules. I think that is a very sound objection, and, indeed, it is scarcely denied. It is said, however, that the words in rule 23 of the "Probate and Administration Rules 1900," which provide for these stamps, merely say that "the officer *may* demand the fees specified," as if he could as a favour take from one man a 6*d*. stamp and from another a 10*s*. 6*d*. stamp. It is quite clear that without that authority in the rules he could not take anything, and what the rule means is that he is allowed to take that much and he must take that much in every instance.

I think that both the objections are good, and dismiss the summons with costs, without prejudice, however, to the issue of another summons.

Summons dismissed with costs.

Solicitors for the applicant: *Gaunson & Lonie* (for *Barnett*, Bendigo).

Solicitor for the respondent: *Rodda* (for *Luke Murphy*, Bendigo).

H. I. C.

(*d*) 19 V.L.R. 1.

(*e*) 5 A.L.R. (C.N.) 46.

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A'BECKETT, J.

1904
August 1.

Ex parte HOPE.

Land Tax Act 1890, *ss.* 8, 9, 35, 31, 37, 41—*Liability to land tax—Bare legal owner—Land under Transfer of Land Act* 1890—*Unregistered transfer—Right of transferor to have name removed from Land Tax Register.*

A., whose name was properly on the Land Tax Register in respect of a landed estate, cut up and sold portions of the estate, the titles to which were under the *Transfer of Land Act* 1890, to various purchasers, who paid their purchase-money, and went into possession under their contracts of sale. A. also executed transfers of the land sold, which, by reason of delay in the Titles Office, caused by the discovery of certain errors in the original Government survey, had not been registered. The provisions of secs. 35 and 41 of the *Land Tax Act* 1890 had been complied with so far as was possible in the absence of registration of the transfers.

Held, that A. was entitled to have his name removed from the Land Tax Register in respect of the land sold.

The Queen v. *Blackwood* ([1890] 16 V.L.R. 157) distinguished.

THIS was an order *nisi* under secs. 35 and 36 of the *Land Tax Act* 1890 calling upon the Registrar of Land Tax to show cause why he should not remove the name of George Hope, the applicant, from the Land Tax Register in respect of certain land.

The name of the applicant was at the date of the application upon the register in respect of the Gnotuk estate, comprising 7,745 acres of land of the first class, in his individual capacity and also as executor of his brother, who died in March 1903, the two having been owners in equal share of the Gnotuk estate, and having been placed on the register as joint owners thereof.

In July 1903, the applicant, in order to wind up his brother's estate, cut up the Gnotuk estate and sold portions of it to various purchasers. The purchasers complied with the terms of their contracts, and the applicant in his dual capacity executed transfers in each case before March 1904, and delivered them to the purchasers, who accepted and executed them. Each of the purchasers had before the date of this application, in pursuance of his rights under the contract, entered into possession and was occupying the same for his use and benefit, and nothing remained to be done in connection with the several purchases except the registration of the transfers of the same. Registration of the transfers had been delayed owing to certain errors in the original Government survey, which had been discovered when the estate was cut up,

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and which made necessary certain amendments in the certificates of title.

In March 1904 the applicant forwarded to the Registrar of Land Tax notices and acknowledgments signed by the applicant and the respective purchasers pursuant to the provisions of sec. 41 of the *Land Tax Act* 1890 with respect to certain pieces of the land transferred, and applied to the Registrar to remove his name from the register in respect of the same on the ground that he was not an owner of such pieces of land within the meaning of the Act. Such application was accompanied by the declaration required by sec. 35. The Registrar, after due proof of the above facts, refused the application and gave notice to the applicant that he was not entitled to have his name removed in respect of pieces of land in question until the transfers of the same had been registered in the Office of Titles.

The applicant thereupon obtained an order *nisi* under sec. 36 calling upon the Registrar of Land Tax to show cause why he should not remove the name of the applicant from the Land Tax Register.

Upon return of the order *nisi*,

Higgins, K.C. (with him *Hayes*), appeared to move the order absolute.

Box to show cause claimed the right to begin.

Higgins, K.C., referred to *Ex parte Lonie* (*a*).

A'BECKETT, J. The party supporting the order *nisi* should begin; that has always been the practice under this Act.

Higgins, K.C.—The applicant, although he is registered proprietor, has the bare legal estate. Sec. 9 shows that possession of the legal estate is not the test of liability, for beneficial owners are made liable in certain cases where they have not the legal estate. It is true that the legal owner is in those cases made answerable, but that is only in the sense that in those cases he has to see that

(*a*) [1883] 9 V.L.R. (E.) 128.

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A'BECKETT, J.
1904
Ex parte HOPE.

the beneficial owners pay their share. The apprehension of the Legislature evidently was that a large landowner might transfer his land to dummy owners in order to evade the land tax. The present case is the very opposite of that, for the applicant has no beneficial ownership at all. The provisions of sec. 35 and sec. 41 have been complied with. A contract to sell, coupled with payment of the purchase-money and taking of possession, is a transfer in equity: *The Queen* v. *Blackwood* (*b*) and *Graves* v. *County Estates Co.* (*c*) are in no way inconsistent with the view contended for by the applicant. He referred also to *Tresider* v. *Jack* (*d*).

(He was stopped by the Court.)

Box—The only means by which a person who has rightly been put on the register in respect of land under the *Transfer of Land Act* can get off the register is by registration of a transfer. Until registration of a transfer there is nothing except equitable rights in a purchaser. Where land is not under the Act a conveyance and an acceptance of that conveyance by the purchaser must be shown. A mere right to call for such conveyance would not be sufficient. So where land is under the Act that which takes the place of the conveyance—namely, registration—must be shown, and until it is shown a person who is rightly on the Land Tax Register remains liable. An unregistered transferee has no estate—he has certain equitable rights, nothing more. The only case in which equitable rights are recognized as constituting an owner under the *Land Tax Act* is the case of a mortgagor: *Vide* sec. 5. If an unregistered transfer is deemed sufficient to entitle a person to have his name removed he could transfer to a stranger and take a transfer back to himself. The result would be that it would be impossible to ascertain the true owner.

A'BECKETT, J. This case seems to me to be comparatively clear. Under the *Land Tax Act* 1890 liability to the tax does not depend upon the person sought to be taxed having the legal estate. He may have to pay the land tax though the land is in mortgage under the general law. He may have to pay the land

(*b*) 16 V.L.R. 157. (*c*) [1891] 17 V.L.R. 117, 712.
(*d*) [1896] 22 V.L.R. 161.

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tax because someone holds the land in trust for him, and though he may not have the legal estate. Then the Act contains provisions that when a person ceases to hold an interest in respect of which he is made subject to the tax, he can by a proper application have the fact recorded that he has ceased to hold that portion of the land in respect of which he was before liable. That would apply where he had an equitable interest or where he had the legal as well as the equitable estate. Then the Act provides means for obtaining the removal of his name. The document by which he has to apply is one which requires him to show that all that is necessary to be done to have the other person made owner has been accomplished—that the one person has conveyed his interest and that the other has taken it. That is expressed in a schedule contemplating the case of an indenture under the old law of conveyancing. Of course that mode of evidence cannot apply where land is under the *Transfer of Land Act*. That form is not applicable. You must substitute the mode of transferring property under the *Transfer of Land Act*. That has been done in this case. With that modification the course prescribed by the Act has been followed and the parties have agreed upon the facts, showing that all has been done so far as the parties are concerned—that the person who desires to be taken off has done all he possibly can to show that the one has parted with his interest and the other has acquired it. There is no suggestion of any sham in the matter—there is nothing wanting in the conclusion or in the ascertainment of the relative positions of the parties. But there has been some hitch in the Titles Office which led to the transfers not being registered.

So far as the parties are concerned they have done all they can possibly do. Then it is said that although they have done all—although there is no doubt about their *bonâ fides*, no doubt that the vendor has parted with his interest and there is nothing more to be got out of him—that, inasmuch as there has not been a perfection of the purchaser's title and the legal estate has not passed, the first proprietor, the vendor, remains liable in respect of land in which he has no interest whatever. That is a conclusion which is opposed to the language and intention of the Act. The Act itself says that the absence of the legal estate will in certain cases

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not free from liability to the land tax the person who is the beneficial owner (sec. 9), so that liability does not in every case depend upon the possession of the legal estate. The authority cited, *Queen* v. *Blackwood* (*supra*), in support of the position taken up by the officer who was asked to remove the name is a case of an entirely different description. The vendor there could not comply with that which the Act provided as the means by which he could get off. He had to show by some distinct transaction that the purchaser had got everything, so as to be able to say—"I have parted with everything, you have got everything." He could not show that. The relations between the parties were altogether unadjusted. There the document relied on was in escrow, and so long as a document remains in escrow it is no document at all. The difference between the situation of the vendor and purchaser in that case and in this is obvious. I can well understand the view that in considering the liability for the tax one cannot go into a number of nice questions to ascertain what interest is supposed to remain in the one, but can only deal with a plain, straight-out transaction where the vendor says, "I have got no interest in the land, someone else has it all." That is the only thing which can be regarded under the Act in ascertaining whether liability to the tax remains. In this case that is perfectly clear so far as the parties are concerned. No doubt is suggested as to the position. The only peculiarity arising in the position is one arising from the necessity for a careful survey—some delay has arisen with reference to that, so that I think that it does not come into conflict in the slightest degree with *Blackwood's Case*.

The case of *Graves* v. *County Estates Co.* (*supra*) is quite in accord with the view which I take here. There the facts were that the owners were cutting up a large estate and selling it to various purchasers on certain conditions referred to in the report of the case. The vendors having paid the land tax, and recognizing it as a liability to which the estate they had cut up was subject, then went to each of the purchasers and said, "Give us that little bit of tax which we have paid in respect of your land." They claimed a right to do this under the conditions of sale. Webb, J., said their demands were unjust, and he says—"Treating the defendant company as the registered owners, they sell a portion of the land which of

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itself would not constitute a landed estate within the meaning of the *Land Tax Act* 1890, and as to which the purchaser would not be bound to pay any land tax. The defendant company, however, says—'We have paid the land tax upon the land sold to you, and you must recoup us.' The answer to that is—'You need not have paid the land tax on the portion I bought.' Sec. 35 of the *Land Tax Act* 1890 provides that any person who is upon the Land Tax Register in respect of any land may at any time apply for the removal of his name upon showing that he is not an owner within the meaning of the Act. Sec. 41 provides that any person whose name is properly on the register shall be deemed to be an owner notwithstanding that he has parted with his interest until he has forwarded to the Registrar a notice of conveyance by him and an acknowledgment by the purchaser." So that I am only following out what seems to me to be plainly the intention of the Act, without saying anything in the slightest degree at variance with what the Court said in either of the cases cited. The circumstances of this case are peculiar, and not likely to arise again. I must say that I feel no doubt that the person taxed is entitled to have his name taken off in respect of this land. The order will be absolute with costs.

Order absolute.

Solicitors for taxpayer: *Willan & Colles.*

Solicitor for Registrar of Land Tax: *Guinness,* Crown Solicitor.

J. M.

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MADDEN, C.J.

1904
April, May.

[VICE-ADMIRALTY COURT.]

BEFORE SIR JOHN MADDEN, C.J., JUDGE.

OWNERS OF SAILING SHIP *FORTUNATO FIGARI* v. STEAMSHIP *COOGEE*.

Ship and shipping—Collision—Merchant Shipping Act 1894 (57 & 58 Vict., c. 60), *ss.* 418, 419, 422, 424, 734—*Foreign ship—Application of Act to foreign ship on the high seas—Collision regulations—Breach of regulations—Mouth-blown fog-horn—Necessary departure from regulations.*

In a collision upon the high seas between a British and a foreign ship, the provisions of sec. 419 of the *Merchant Shipping Act* 1894, sub-sec. (4), do not apply to the foreign vessel in the absence of an Order in Council made under the provision of either sec. 424 or 734 of the Act directing that the provisions of Part V. should apply to such foreign vessels.

An Order in Council directing that the British Regulations for Prevention of Collision at Sea should apply to ships of a foreign country does not of itself apply the provisions of Part V. of the *Merchant Shipping Act* 1894 to ships of that country, and the presumption of fault created by sec. 419, sub-sec. (4), for breach of one of such regulations does not attach to such foreign vessel.

In a suit by a foreign ship against a British ship for damages for collision on the high seas the rule laid down in the *Fanny M. Carvill* ([1875] 13 App. Cas. 455 (*n.*)) and the *Duke of Buccleugh* ([1891] A.C. 310) that the presumption of culpability caused by a breach of the regulations may be met by proof that the infringement could not by any possibility have contributed to the collision, and that the burden of showing this lies on the party guilty of the infringement (proof that the infringement did not in fact contribute to the collision being excluded) does not apply to such foreign ship where the country to which the ship belongs has merely adopted the British Regulations for Preventing Collisions at Sea without adopting the provisions of Part V. of the *Merchant Shipping Act* 1894. In such a case the ordinary maritime law of the Court will be applied, and proof that the breach of the regulations did not as a matter of fact contribute to the collision is admissible.

If a mechanical fog-horn, which without negligence has become ineffective when used at sea, is provided for use on a ship to which the regulations apply, the user of the fog-horn by mouth in place of the mechanical means comes within the exception contained in sec. 419, sub-sec. (4), of the *Merchant Shipping Act* 1894, which permits a departure from the regulations under circumstances which make such departure necessary.

Sub-sec. (4) of sec. 419 of the *Merchant Shipping Act* 1894 is not part of the *lex fori* of the Court; it does not concern procedure but goes to the substance of a party-litigant's rights.

A ship under a coal charter whilst proceeding from her last port of call to her loading port to fulfil her charter was disabled in a collision with another ship, caused by the sole negligence of the latter. The injuries received obliged the chartered ship to return to port for repairs. The delay caused in effecting the repairs prevented her arrival at the port of loading until long after the arrival date fixed by the charter-party, and further caused her to lose her "turn" at the coal shoots at the port of loading, thus delaying her loading for 23 days. The

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charterer elected to proceed with his charter, notwithstanding the non-arrival of the ship at the loading port at the due date.

Held, in a suit for damages caused by the collision, that damages for the delay caused by the ship's loss of "turn" at the coal shoots cannot be recovered.

COLLISION.

This was a suit for damages for a collision between the sailing ship *Fortunato Figari*, belonging to the mercantile marine of the Kingdom of Italy, and the British steamer *Coogee*, of the Port of Melbourne, which occurred on the high seas in Bass Strait on the early morning of the 25th December 1903. The facts are detailed in the judgment of Madden, C.J., sitting as Judge of the Vice-Admiralty Court for the State of Victoria.

Isaacs, K.C. (with him *Coldham*), for defendants.

Box (with him *Bryant*) for plaintiffs.

Isaacs, K.C.—It is proved that article 15, clause (2), of the regulations was not observed by this foreign sailing ship. The fog-horn of the sailing ship was at the time of the collision being sounded by the mouth, and not by mechanical means, as provided by the Regulations for Preventing Collisions at Sea of 1897. If so, then sec. 419, sub-sec. (4) of the *Merchant Shipping Act* 1894 applies, and both vessels must be held to blame. This sub-section, which is taken from sec. 17 of 36 & 37 Vict., c. 85, relates to the *lex fori* and applies equally to a British or foreign ship on the high seas. The plaintiffs here invoke the jurisdiction of a British Court and are bound by the sub-section. This sub-section is a rule of evidence. Prior to 1873 the liability for injury was based on negligence. The position indicated by the decision of *The Fenham* (*a*) brought about the change in the legislation, so that there is now no necessity to go into the question—Was the collision "occasioned by the non-observance of the rules," since the passing of sec. 17 of the *Merchant Shipping Act* 1873. The question now is reduced to the proposition that, being a breach in fact of the regulations in the present case which might have had some possible connection with the collision, could such breach by any possibility have contributed to the collision, excluding proof that as a fact it did not: *The Fanny M. Carvill*, reported in a note

(*a*) [1870] L.R. 3 P.C. 212.

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to the case of *The Glamorganshire* (b); *The Duke of Buccleugh* (c); *The Hochung* (d). The comparative merits of sounding the fog-horn by the mouth and by the mechanical means are quite inadmissible. The plaintiffs have to show that by no possibility could the breach of the regulation have affected the collision, excluding from such proof the question of fact that it did not: *The Lovebird* (e); *The Khedive* (f); *The Arklow* (g). The aim of the regulation is uniformity: See *Abbott on Shipping* (14th ed.), 916.

[MADDEN, C.J. The fog-horn was an efficient horn, but unreliable.]

There is nothing which permits the substitution of one efficient means for the efficient means required by the regulations. The departure from the regulations must be a *necessary* departure to bring the plaintiffs' ship within the exception contained in sub-sec. (4) of sec. 419 of the *Merchant Shipping Act* 1894. There is no evidence upon which the Court could act to show that the emergency mentioned in the sub-section had arisen: *The Benares* (h); *The Khedive* (i); *The Talbot* (k); *The Devonian* (l); *The Chilian* (m). The same principles are applied in the United States of America: *The Energy* (n); *The Catalonia* (o); *The Bolivia* (p); *The Trave* (q); *The Niagara* (r). As to the duty of a vessel in a fog, see *The Kirby Hall* (s); *The Dordogne* (t); *The Martello* (u). If both vessels are to blame the damages will be divided: *Abbott on Shipping* (14th ed.), 918.

Box (with him *Bryant*) for the plaintiffs—The collision in this case occurred between a British and an Italian ship on the high seas and not within British jurisdiction. The evidence shows that the Kingdom of Italy, under the provisions of the *Merchant*

(b) [1888] 13 App. Cas. 454.
(c) [1891] A.C. 310.
(d) [1882] 7 App. Cas. 512.
(e) [1881] 6 P.D. 80.
(f) [1880] 5 App. Cas. 876, per Lord Blackburn, at p. 894.
(g) [1883] 9 App. Cas. 136.
(h) [1883] 9 P.D. 16.
(i) 5 App. Cas. 876.
(k) [1891] P. 184.
(l) [1901] P. 221.
(m) [1881] 45 L.T. 623.
(n) 42 Fed. Rep. 301.
(o) 43 Fed. Rep. 396.
(p) 49 Fed. Rep. 169.
(q) 68 Fed. Rep. 390.
(r) [1890] 84 Fed. Rep.
(s) [1883] 8 P.D. 71.
(t) [1884] 10 P.D. 6.
(u) [1893] 153 U.S.R. 64.

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Shipping Act 1894, under the Order in Council put in evidence, has adopted the Regulations for Preventing Collisions at Sea issued by the Board of Trade, but has not adopted, as it might have done, the *provisions* of Part V. of the *Merchant Shipping Act* 1894. The result is that the "presumption of fault," which would have applied to this case had the collision occurred on the high seas between two British ships or between a British ship and a ship of a foreign State which had adopted the *provisions* of Part V., as distinguished from adopting the regulations, does not apply, and consequently the case has to be dealt with quite apart from sec. 419, sub-sec. (4). The regulations themselves provide no sanction for any breach, but the Act of 1894 supplies the sanction for a breach, provided the country to which the ship belongs has chosen to adopt the *provisions* of the Statute. A comparison of the various sections in Part V. shows this. Sec. 418 applies the provisions to any foreign ship *within British jurisdiction*, thereby implying that the provisions of the Act *primâ facie* do not apply to foreign ships on the high seas. Sec. 419, sub-sec. (4), is not a matter of the *lex fori*. It is important to consider its effect. It takes away from the litigant the inherent right of showing that the breach of the regulation did not as a fact contribute to the collision. The British Parliament does not except by plain language attempt to legislate with reference to foreigners. The right to limitation of liability did not apply to foreign ships until by legislative enactment it was expressly extended by 25 & 26 Vict., c. 62, s. 54. The argument that sec. 419, sub-sec. (4), applies to foreign ships on the high seas renders sec. 418 of the same Statute inoperative. Again, sec. 422 does not apply to foreign ships on the high seas unless that section has been applied by the foreigner under sec. 424 or sec. 734 of the *Merchant Shipping Act* 1894, of which there is no evidence. As to this not being part of the *lex fori*, see *Cope* v. *Doherty* (*v*); *General Iron Screw Collier Co.* v. *Schurrmanns* (*w*); *The Zollverein* (*x*); *Chartered Bank of India* v. *Netherlands India Steam Navigation Co.* (*y*); *The Gaetano & Maria* (*z*); *The Wild*

(*v*) [1858] 4 K. & J., p. 390.
(*w*) [1860] 1 J. & H. 180.
(*x*) [1856] Swab. 96.
(*y*) [1883] 10 Q.B.D., at p. 535., per Brett, L.J.
(*z*) [1882] 7 P.D., p. 143 *et seq.*

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Ranger (*a*); *The Leon* (*b*); *The Saxonia* (*c*). As to English legislation not affecting foreign ships unless specially mentioned: *The Nevada* (*d*); *The Germania* (*e*); *The Thuringia* (*f*); *The Amalia* (*g*); *Dicey's Conflict of Laws*, 664 *et seq.*; *Westlake*, 227; *The Dumfries* (*h*); *The Repeater* (*i*). The "presumption of fault" does not apply to a foreign ship on the high seas: *The Magnet* (*k*). In *The Fanny M. Carvill* (*l*), *The Khedive* (*m*), and *The Lovebird* (*n*) the point was not raised. In the case of *The Koning Willem I.* (*o*) the point was expressly taken but not decided. The presumption of fault if it applies to this foreign ship may be rebutted by evidence that the breach could not by any possibility have contributed to the collision: *The Duke of Buccleugh* (*p*); *The Fanny M. Carvill* (*q*); *The Tirzah* (*r*); *The Mary Houndell* (*s*); *The Devonian* (*t*); *The Breadalbane* (*u*); *The Englishman* (*v*). In this case there was no proper or sufficient look-out. The speed of the steamer, 14 knots, and the position of the look-out on the bridge, in the immediate vicinity of the noise of the machinery, absolutely prevented the hearing of the fog-horn of the sailing ship. It is a proved fact that the fog-horn in question had a greater volume of sound and a greater range when sounded by the mouth than when sounded by the mechanical means. As therefore the look-out on the steamer did not hear the horn until the throes of the collision, such look-out could not by any possibility have heard the sound of the fog-horn when sounded by the mechanical means, as it emitted a less volume of sound and had a less range of audibility. Again, the plaintiffs are within the exception contained in the sub-sec. (4) of sec. 419, even if the sub-section should be held to apply to this foreign ship. There was an unknown inherent defect in the fog-horn when sounded by the mechanical means

(*a*) [1862] Lush. 553.
(*b*) [1881] 6 P.D., pp. 150, 151.
(*c*) [1861] 15 Moo. P.C. 262.
(*d*) 1 Asp. M.C. 477.
(*e*) 3 Mar. L.C. (O.S.) 269.
(*f*) 1 Asp. M.L.C. 283.
(*g*) [1837] 1 Moo. P.C. (N.S.) 485.
(*h*) [1856] Swabey 63.
(*i*) [1866] 14 L.T. (N.S.) 258.
(*k*) [1875] L.R. 4 A. & E. 417.
(*l*) 13 App. Cas. 455 (*n.*)
(*m*) 5 App. Cas. 876.
(*n*) 6 P.D. 80.
(*o*) [1903] P. 114.
(*p*) [1891] A.C. 310.
(*q*) 13 App. Cas. 455 (*n.*)
(*r*) [1878] 4 P.D., at p. 37.
(*s*) [1879] 4 P.D., p. 207.
(*t*) [1901] P. 221.
(*u*) [1881] 7 P.D. 186.
(*v*) [1877] 3 P.D. 18.

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which was only discovered on the 23rd December, after the vessel left port. The failure of the mechanical means was both dangerous and misleading. Its failure to effectively operate would mislead an approaching ship; a failure to successfully emit more than one when two blasts were necessary would indicate a ship upon a tack other than the one such ship was actually upon, so as to come within the words "circumstances of the case made a departure from the regulations necessary." It is the same as if the fog-horn had broken down at sea, and is covered by the case of *The Chilian* (*w*); *The Benares* (*x*).

Cur adv. vult.

June 1.

MADDEN, C.J., read the following judgment:—This is an action of collision to have the steamship *Coogee* condemned in damages for injuries caused to the ship *Fortunato Figari*. The case is one of considerable importance, chiefly by reason of the legal considerations which are involved in it, which are many and somewhat uncertain. I have had, however, the assistance of earnest and learned argument upon them, and, although much that I have said upon the matter has been said already, and better said, and in some cases by the highest judicial authority, I have once again considered the law from the standpoints of learned counsel, and I have restated what I believe it to be now.

The steamer *Coogee*, a British ship registered at Melbourne, of 740 tons register, left Tamar Low Heads at 7.30 p.m., or thereabouts, on 24th December 1903, bound for Melbourne.

On the 18th December the *Fortunato Figari*, an Italian full-rigged ship, had left Melbourne under charter to call at Newcastle, in New South Wales, to load coal and to proceed therewith to Honolulu. She is 2,149 tons register. She had encountered light head winds up to 24th December, and had been beating about Bass's Straits in consequence, and on the night of that day she was sailing close-hauled on the port tack on a very light wind from east-south-east, and was steering south-west. The sea was calm, with some swell on. She had all sail set.

About midnight a very thick fog came on. The captain of the *Fortunato Figari* came on deck to his watch about that hour,

(*w*) 45 L.T. 623. (*x*) 9 P.D. 17, at p. 19.

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and, in view of the fog, he ordered sail to be reduced, so as to take way off her. She was thereupon stripped of all sail except the foresail, the upper and lower topsails, the inner jib, and the staysail. Her speed under this sail was about 1½ knots, and so continued up to the collision, the subject of this action. According to the evidence of the captain, the chief officer, the boatswain, and three of the crew of the *Fortunato Figari*, which has been really unquestioned, everything was done upon that ship to provide against danger. A good look-out was kept by two sailors on the forecastle, and by the second officer on the bridge. A fog-horn was blown, but by mouth, under circumstances to be hereafter mentioned. It was ordered to be so blown two successive blasts every minute, though the sailor who blew it says he so blew it at half-minute intervals. The captain himself was in charge upon the poop. He arranged a blue light at the top of the companion ladder on the port side, and he ordered that complete silence and quiet should be maintained upon the ship, which order was obeyed. The boatswain kept watch on the poop also.

She continued her course under these conditions without incident until 2.30 a.m., when a steamer's whistle was heard, at what was estimated to be from three-quarters of a mile to a mile off, on the starboard quarter. The horn of the ship continued to be sounded two distinct prolonged blasts at the interval of half a minute. The steamer drew nearer, and blew her whistle five or six times, and each time in answer, as it seemed, to blasts of the ship's horn, and as indicated by her whistling, because she could not be seen through the fog, though the helmsman says he saw what he supposed were her deck electric lights. She crossed the bows of the ship in about 10 minutes or so, and the last whistle heard from her was far ahead and on the port bow. This incident is of importance for the purpose only of showing that the fog-horn of the ship was effective and was well heard, notwithstanding the fog, by that steamer, and at considerable distances, and that the steamer's whistle was also heard effectively by the people on the *Fortunato Figari*.

This ship proceeded as before, seeing no sign of any vessel, and hearing nothing, until very nearly 3.45 a.m. of the 25th December, when her look-out and her captain, at the same moment, and

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indeed all of her crew who have been called, heard the beat of a steamer's propeller at apparently little distance on the ship's port side—about three or four points on that bow, some of the witnesses state. The look-out instantly reported to that effect, and the captain acknowledged it from the poop. The fog-horn was blown, and the captain lit the blue light on the port side of the poop.

Almost immediately after the propeller wash was heard, the green light of the *Coogee* (for she was the steamer) showed through the fog, and she was then observed about her own length off—*i.e.*, some 200 feet—heading somewhat on the port bow of the *Fortunato Figari*, as if aiming to cross her bows. The captain of the ship ordered her helm hard-a-starboard, to endeavour to throw her sails aback, and so stop her way. The *Coogee* blew her whistle for the first time, so far as anyone on the *Fortunato Figari* heard, and she was observed to pay off under a starboard helm, and within a time variously estimated as from nearly one minute to two minutes, but which must have been in fact much less, she struck the *Fortunato Figari* just aft the stem, carrying away all her bows, together with all the gear on the under side of the bowsprit, and leaving a chasm some 12 or 14 feet wide in the bow of the ship. The *Coogee* was raked from end to end. Her two masts and her funnel were broken off at the deck and laid along it, though the funnel guys and stays still remained attached to the steamer.

Her bridge also was destroyed and swept flat, as also were the erections on the hurricane deck. The photograph put in evidence shows the wreck produced. The captain of the *Coogee* was killed, though the fact was not ascertained until his body was found later in the wreckage; her helmsman was dreadfully injured, and, being caught in the *débris*, bled to death before any help could be given; her second officer, who was in charge of the watch, was very badly injured, and rendered quite helpless.

The two vessels became entangled in some way and fell alongside of one another. Thereupon the chief officer of the *Coogee*, and all her hands except the chief, the second, and third engineers, and one fireman named Snook, fled from her and clambered from the *Coogee* to the *Fortunato Figari*. The two vessels then drifted apart and each disappeared from view of the other in the fog.

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All this happened very rapidly, but meanwhile Captain Schiafino of the *Fortunato Figari* caused his chief officer and his boatswain to find out if his ship was in immediate danger. They found that the forward bulkhead was closed, and standing firm, and that the ship was making no water. Finding then that the ship was for the present safe, he ordered his starboard lifeboat to be cleared and lowered, and directed that the lady passengers and children, and any wounded persons, should be taken off the *Coogee* and brought to the *Fortunato Figari*. For the purposes of this action it is unnecessary to enter into the labour and the difficulties which attended this. As a fact the lifeboat made three trips removing the crew of the *Coogee* from the ship back to her and taking other passengers from the *Coogee* to the ship. In addition the ship's gig was also lowered and used in carrying hawsers from the one vessel to the other. All the details of these operations will have to be examined in a salvage action which I tried in connection with this one, and for the present all that needs to be said is that after much difficulty the *Fortunato Figari* took the *Coogee* in tow and towed her to near Port Phillip Heads, whence each vessel proceeded alone, the one to an anchorage in Hobson's Bay, the other to her usual berth in the River Yarra. (His Honor then dealt with the evidence as to the circumstances of the collision and continued.) I find therefore that the *Coogee* was navigated at a speed which was "utterly reckless," considering the state of the weather at the time and place, and was wholly to blame, in fact, for the collision, and that the *Figari* did not in any respect contribute to it, unless her use of her fog-horn by the mouth raises, in all the circumstances of law and of fact, such a presumption as binds her constructively for a default.

For the defendants it is contended that, even assuming that the *Coogee* was unmistakably in fault, and that the *Figari* was in all respects otherwise blameless, she is shown to have infringed the Sailing Regulations, article 15. by using, during a fog, a fog-horn not blown by mechanical means. Then they say sec. 419 of the *Merchant Shipping Act* 1894, sub-sec. (4), thereupon declares that she is to be "deemed to be in fault," subject to the proviso of that section, and that she is therefore subject to the rule of this Court as to dividing damages..

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The plaintiffs meet this view by protesting that sec. 419, sub-sec. (4), does not apply to the *Figari*, which is a foreign ship, since the collision occurred on the high seas.

It is proved, and not contested, that Her late Majesty, by Order in Council, in pursuance of sec. 424 of the *Merchant Shipping Act* 1894 did direct that the collision regulations should apply to Italian ships, but the plaintiffs maintain that that application of the Sailing Regulations by Italy's consent did not subject Italy to any of the "provisions" of Part V. of the Act, and that the regulations which Italy has consented to adopt do not subject a vessel which infringes them to the consequences which sec. 419, sub-sec. (4), of the Act imposes, provided it reasonably appears that such infringement did not, in fact, contribute to bring about the collision.

It was retorted that sec. 418, sub-sec. (1), makes the regulations when adopted by the appointed authorities part of the Act. I think that there is nothing, however, in that argument. The section gives the regulations, no doubt, statutory force, but the "regulations" are put in apposition to the "provisions of this part of the Act" in all the sections important here.

The defendants also contend that if all this part of the Act does not apply to Italian ships, that sec. 419, sub-sec. (4), at all events does so, because they say it is not an enactment addressed to *ships* at all, but is a rule of evidence and practice, dictated to the *Courts* of the British Empire, and is therefore part of the *lex fori* which must bind the foreigner who appeals to one of those Courts.

I have therefore to ascertain what is now the law as to the applicability of these provisions of the *Merchant Shipping Act* 1894 to a foreign ship which has been in collision with a British ship on the high seas, and whose owners have brought suit in a Vice-Admiralty Court of Britain.

The question appears to me to be pretty plain if one follows the authorities in order, and notes the alterations of the British legislation at various periods on the way.

Before the *Merchant Shipping Act* 1854 there were many judicial declarations that collisions on the high seas were to be adjudicated on in British Courts of Admiralty according to the general law maritime, as administered by those Courts; and that

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as the subjects of other countries are in no manner bound, *primâ facie*, by the legislation of any given country not their own, "it is never to be presumed, unless the words are so clear that there can by no possibility be a mistake, that the British Legislature exceeded that power which properly belonged to it, viz., to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further:" Dr. Lushington, in *The Zollverein* (y), and Lord Stowell, in *The Nostra Senora de los Dolores* (z).

If the Imperial Parliament does expressly and unmistakably include the subjects of other countries in the operation of its legislation, then, it being among the subjects of Britain legislatively omnipotent, the Courts cannot question it; they must administer it, and leave the Government of Britain to settle the proprieties of it with the countries affected as it best can or pleases.

In order to hasten, though, I fear, not to be brief, I propose, as shortly as I can, to see how, starting with the just cited general proposition, the Courts have up to now treated the immediate question. I begin at 1856. The *Merchant Shipping Act*, 17 & 18 Vict., c. 104, then in force was that of 1854. It contained sections whose words now important, only, I will state. *Part IV.—Safety and Prevention of Accidents*, sec. 291:—

"The fourth part of this Act shall apply to all British ships and all foreign steamships carrying passengers between places in the United Kingdom shall be subject to all the provisions contained in the fourth part of this Act and likewise to the same provisions with respect to the certificates of the masters and mates thereof to which British steamships are subject." Sec. 295 authorized regulations to be adopted by the Admiralty and commanded that *all owners and masters* should observe them.

Sec. 296 provided what "any ship whether a steam or sailing ship meeting another ship" should do, so as to avoid collision when there was risk of collision. Sec. 297 provided what *every steamship* navigating a narrow channel should do.

Then sec. 298 provided—"If in any case of collision it appears to the Court before which the case is tried that such collision *was occasioned by* the non-observance of any rule for the exhibition of lights or the use of fog-signals issued in pursuance of the powers

(y) Swabey 96. (z) [1813] 1 Dods. 290.

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hereinbefore contained or of the foregoing rule as to the passing of steam and sailing ships or of the foregoing rule as to a steamship keeping to that side etc. the owner of the ship by which such rule has been infringed *shall not be entitled to recover any recompense whatever* for any damage sustained by such ship in such collision unless etc."

In these sections the words are literally universal as to "any ship" and "every steamship," but the part of the Act is applied to "all British ships and to all foreign steamships carrying passengers between places in the United Kingdom." In 1856, in *The Zollverein* (*a*), Dr. Lushington decided that secs. 296 and 298 did not apply to a collision on the high seas between a British ship and a foreign ship, because the general law maritime applied, *primâ facie*, to such cases, and the British Statute was not expressly and distinctly applied to foreign ships, but only to *certain* foreign ships specified in sec. 291, and that the general expressions used in the sections must be confined, according to the general presumption already quoted, to the subjects of Britain. In that case as here it was urged that sec. 298 was part of the British *lex fori*, and was merely remedial, and that it, at all events, applied to a foreigner sued in a British Court. His lordship said that sec. 296 was wholly applicable to the merits of the case, and that 298, though remedial, was "entirely founded on and emanated from 296," and that as the latter section did not apply to the foreign ship, neither did the former, and he decided the case on the principles of the general law maritime.

In 1858, in the Court of Chancery, a suit, *Cope* v. *Doherty* (*b*), was instituted between the owners of two American ships which had been in collision on the high seas. It was to restrain an action in the Admiralty Court. Wood, V.C., following the general rule, and adopting the same view of the sections of the *Merchant Shipping Act* 1854, and considering also sec. 504 of that Act, limiting the liability of owners of ships in default, decided that that section did not apply to owners of foreign ships in default in a collision on the high seas.

Again, in that case it was contended that section 504 was really a part of the procedure of British Courts, prescribed by legislation,

(*a*) Swabey 96. (*b*) 4 K. & J. 367.

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and was therefore part of the *lex fori*, but at pp. 384 and 390 His Lordship is quite distinct that sec. 504, although it prescribed a rule which gave a measure of damages to be observed in the Courts, "did not relate to the form of judicial procedure, but to the very substance of the matter in respect of which such procedure is to take place."

This judgment was confirmed by Knight-Bruce and Turner, L.JJ., on appeal.

In March 1861 the Privy Council, in *The Chancellor* (c), an action for damages against an American ship by a British ship in respect of a collision on the high seas, held that the sections of the *Merchant Shipping Act* 1854 had no application to such a case, and decided it on the principles of the general law maritime. In this case the point of the *lex fori* as to sec. 298 was not raised.

In December 1862 the case of *The Wild Ranger* (d) was tried. At that date the first important alteration of the *Merchant Shipping Acts* 1854 had been made by the passing of the *Merchant Shipping Amendment Act* 1862, 25 & 26 Vict., c. 63, in July 1862, but presumably the subject of this action had arisen before then. It was an action by the owners of a British ship against an American ship for damages for collision, and the latter, which was to blame, sought to have the benefit of sec. 504 of the Act of 1854 to limit her liability. Dr. Lushington held again in this case that the Act did not apply to such a case, because it did not apply to foreign ships on the high seas, and he examined all the then authorities in the course of his decision. The contention that this sec. 504 was a matter of procedure only was again raised, but was disregarded.

The Saxonia (e) was heard in December 1862, and I presume the subject of it had arisen before July of that year, when the amending Act came into force. The decision was not given, however, till February, 1864. *The Saxonia* was a foreign steamship, and came into collision with a British ship in the Solent. The principal question was whether the foreign vessel was affected by the secs. 296, 297, and 298 of the *Merchant Shipping Act* 1854. The Court held that the Solent was part of the high seas, and also

(c) [1861] 14 Moo. P.C. 202. (d) 32 L.J. Adm. 49.
(e) 15 Moo. P.C. 262.

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said—"We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the Statutes enacted to govern British ships. This being so, it follows that the *Merchant Shipping Act* 1854 has no application to this case, as it has been fully determined that where a British and a foreign ship meet on the high seas the Statute is not binding on either. The principle, therefore, by which this case must be decided must be found in the ordinary rules of the sea." And their lordships so decided it. In this case nothing was said as to the *lex fori* proposition alleged in some other cases to be the true effect of sec. 298.

These cases show the state of the law up to July 1862. It is a uniform line of decision, including the highest authorities, on the two points raised by the defendants here in this present connection, and it is against them, unless the verbal and substantial alteration of the law by the subsequent Acts shall be found to make a difference. The amending Act is that of 1862. Sec. 25 enacted new sailing regulations set out in the Schedule, and gave authority to alter them from time to time.

Sec. 26 directed the Board of Trade to publish them as therein prescribed. Sec. 27 is again expressed to apply to "all owners and masters of ships who are to be bound to take notice of all such regulations as aforesaid," etc. Sec. 29 provides that "if in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be *deemed to be in fault* unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary."

This, in effect, alters the former sec. 298 by enacting that when it appears that the collision was occasioned by an infringement of any regulation, the infringing ship is to be deemed to be "in fault" unless she can satisfy the Court that the infringement was in the circumstances necessary. It also substitutes the ordinary consequences of being a ship "in fault" for the former total deprivation of any compensation. Then sec. 54, which limited the liability

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of ships in fault in collisions, makes the important difference, as to sec. 504 of the Act of 1854, that it is applied to the owners of any ship, whether British or foreign. Sec. 57 expressly provides that "whenever foreign ships are *within British jurisdiction* the regulations for preventing collisions" (in the Schedule, or thereafter altering them) "and *all provisions of the Act* relating to such regulations or *otherwise relating* to collisions shall apply to such foreign ships and in any cases arising in any British Court of Justice concerning matters happening *within British jurisdiction* foreign ships shall so far as regards such regulations and provisions be treated as if they were British ships." This section is substantially the same as sec. 418, sub-sec. (2), of the Act of 1894. Sec. 58 also is, in most respects, the same as sec. 424 of the Act of 1894, although some notable differences of expression have been used in the latter. I must, by-and-by, examine those sections closely, but for my present pursuit it is enough to thus refer to them now.

After this Act of 1862 came into force the first case which arose for decision, as to the now important questions was *The Amalia* (*f*), in July 1863. A British ship, *The Amalia*, wrongfully came into collision with a Belgian ship, *The Marie de Brabant*, in the Mediterranean, on the high seas. The owners of the latter and of her cargo brought suits in Admiralty, in England, against the former, which then claimed under sec. 54 of the Act of 1862 to limit her liability, notwithstanding that the *Marie de Brabant* was a foreign ship, and that the collision was on the high seas. This petition was demurred to, and Dr. Lushington overruled the demurrer, and an appeal was had to the Privy Council. Dr. Lushington plainly recognized the former decisions of himself and other Judges as quite sound as to actions for damages for collisions between British and foreign vessels on the high seas, and still held that the *Merchant Shipping Act* of 1854 did not apply to them, and by reason of the first principle which made it so already referred to. He, however, considered that sec. 54 of the Act of 1862 expressly and distinctly applied the limitation of damages provision to the owners of all ships *whether British or foreign*, and after justifying this parliamentary excursion into other people's business by demonstrating its entire inherent pro-

(*f*) 1 Moo. P.C. (N.S.) 473.

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priety, he held that, *as to questions of limiting liability*, the Act of 1862 did alter the *ratio* of such of the former decisions as had dealt with that particular question; at the same time he markedly indicated that the former decisions as to collisions on the high seas between British and foreign vessels were still unaffected by the amending Act.

On the appeal Lord Chelmsford gave the judgment of the Privy Council, which upheld Dr. Lushington's decision, and at p. 485 his Lordship makes some observations which are in my opinion very important, for several reasons, in this present case. For the immediate discussion they are important as showing that the 54th section is quite disconnected from the other sections relating to collisions, and the consequences flowing from them; and that the decision did not affect former authorities as to the non-applicability of kindred sections of the *Merchant Shipping Act* 1854 to collisions between British and foreign ships on the high seas. The old point that the sec. 54 was part of the *lex fori*, and that that would get over any difficulty of the application of it to foreign vessels, was dealt with once again by Dr. Lushington in this case, at p. 474, by saying that "fully recognizing the *primâ facie* force of this objection" of the non-applicability of sec. 54 to foreigners on general principles, and the difficulties of the Act, "I do not think it is removed by the ingenious suggestion that this limited liability is part of the proceedings and a part of the *lex fori*."

At p. 485, Lord Chelmsford, after examining sec. 54, and its effects, as showing that it *did* apply to foreign ships in respect to collisions on the high seas, then proceeds thus:—"There may be still some difficulty remaining upon this construction of the 54th section of the amending Act, arising out of the words of the 57th and 58th sections of that Act, if the words in the 57th section, 'all provisions of this Act relating to such regulations or otherwise relating to collisions,' and in the 58th section, 'or any provisions of this Act relating to collisions,' extend to the provisions of the 54th section as to limitation of liability in damages for a collision, then those provisions would apply to foreign ships only when they were within British jurisdiction, or when beyond the limits of British jurisdiction where for the

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purpose of establishing reciprocity an Order in Council has been made directing that the *provisions of the Act* shall apply to the ships of the foreign country. But looking to the heading which immediately precedes these sections, describing the sections which follow as containing 'arrangements concerning lights, sailing rules, salvage, and measurement of tonnage in case of foreign ships' (none of which subjects apply to the limitation of liability), and considering the language of the 57th and 58th sections, the words 'relating to collisions' would seem more naturally to refer to regulations respecting collisions themselves than to provisions which are applicable only after collisions have occurred, and are but a consequence of them."

Thus *The Amalia* severs the case of limitation of liability from the comprehensive decision of the previous cases, that *none* of the provisions of the *Merchant Shipping Act* applied to collisions on the high seas in which foreign vessels had a part, and that only because of the new words introduced into sec. 54 by the Legislature, but it left the effect of the previous decisions otherwise unimpeached.

The next important decision of which I have become aware is *The Scotia* (*g*). It is a decision of the Admiralty Court of America. The learned Judge examines all the English decisions, and he affirms the same propositions as they do. He further held that an English Court would, after the coming into operation of the *Merchant Shipping Act* of 1862, sec. 58, and after a proclamation made in pursuance of that section that America was willing to be bound by the British sailing regulations, treat the ships of that country as if they were British ships for the purpose of requiring that they should observe those regulations as to lights; but that an American Court would not act similarly, because there was no statute in America giving a like authority to that given by sec. 58 of the *Merchant Shipping Act* of 1862, but would apply the general usages of the sea as the proper principle, and would regard those usages as evidenced by the British and American Sailing Regulations, which were practically identical, because all the principal maritime nations now adhere in practice to the devices of these regulations.

(*g*) [1869] 20 L.T. (N.S.) 375.

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His Honor, on p. 380, uses some expressions of text writers which appear to me to be a too general inference, not warranted, so far as I can see, by any authoritative decision, and which I think are discountenanced by some.

The next case in order is *The Nevada* (*h*). It is a decision of the Vice-Admiralty Court of New South Wales in 1872. The Court follows *The Scotia*, and decides that in a collision on the high seas between a British ship and an American steamer both were subject to the British Sailing Regulations, because at that date a proclamation had been made by Her Majesty, in pursuance of sec. 58 of the *Merchant Shipping Amendment Act* 1862, that America was willing to be bound in respect of such regulations, and sec 61 of the same Act enacted thus:—"Whenever an Order in Council has been issued under this Act applying any provision of this Act or any regulation made by or in pursuance of this Act to the ships of any foreign country such ships shall in all cases arising in any British Court be deemed to be subject to such provision or regulation and shall for the purpose of such provision or regulation be treated as if they were British ships." While holding this, however, it is important to note that the Court also held that sec. 33 of the Act of 1862 did not apply to the American steamer, because although America had shown her willingness to adopt the British *regulations*, by passing an Act of Congress to that effect, which had been acted on by Her Majesty's proclamation already referred to, America had *not* adopted sec. 33 of the Act of 1862, and so her ships were not bound by that section.

In this case it was not contended that the provisions of sec. 33, sub-sec. (2), applied, because it was merely a part of the *lex fori*, though its terms would appear to warrant such an argument quite as much as those of sec. 419, sub-sec. (4), of the present Act do.

Recapitulating once again, we find, as I understand the cases, that the old rule that British legislation is to be deemed to apply to those only who are, either by reason of their allegiance, or by reason of their being within British territory, subject to the municipal law of Britain, unless such legislation clearly and distinctly enacts otherwise, is fully maintained; and that all the cases which succeeded the *Merchant Shipping Amendment Act* of 1862, up

(*h*) [1872] 27 L.T. (N.S.) 720.

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to 1873, adhered to that rule as laid down in the cases which preceded that Act, except where that Act specifically enacted some express application of parts of itself to foreign countries. In giving effect to those express applications the Court nicely discriminated, so that no other part of the Act was applied against foreigners, except just so much as was expressly enacted against them, or which they themselves had chosen to submit to under secs. 58 and 61. And in *The Amalia* it was plainly indicated by the Lords of the Privy Council that the ordinary principles which had always theretofore prevailed as to *collisions* on the high seas, between British and foreign vessels, were not otherwise, or to any greater extent, abrogated.

In 1873 the next stage of legislative variation occurred by the *Merchant Shipping Amendment Act* of 1873, 36 & 37 Vict., c. 85. Of this Act the only sections relevant to the present discussion are secs. 16 and 17. Sec. 16 appears to differ from sec. 33 of the Act of 1862 in no respect which is important here, except that in the last clause the words "of a British vessel" are introduced into a re-arrangement of that part of the former section's enactment. So far as this is material at all it seems to emphasize the intention of the Legislature to not apply that particular part of that section to foreigners in any case, whether the sections were adopted by them or not. These words were struck out in 1894, and I will recur to them again. Sec. 17 of the Act of 1873 is very important, because it introduces what is now sub-sec. (4) of sec. 419 of the Act of 1894, and it alters sec. 29 of the Act of 1862 by removing from those who alleged an infringement of a regulation by the opposing ship the burden of proving that such infringement occasioned the collision, and by declaring that on proof that any of the regulations under any of the Acts from 1854 to 1873 has been infringed, "the ship by which such regulation has been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." The regulations themselves have never contained any such provision as this, and the question now begins to present itself, did this section apply to foreign ships which came into collision on the high seas with British ships—(*a*) in any case; (*b*) in those cases where the foreign

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Government has consented to come under secs. 58 and 61 of the Act of 1862? There is no express decision on this question up to date of which I am aware, unless *The Englishman* (*i*) be one, of which I shall speak presently. There are cases in which ships with foreign names got into collision with British ships, and in subsequent litigation between them this section was applied as if the foreigner was bound, but the question has not been raised or argued. In such cases, if the ships were foreign ships at all, it may have been that their Government had agreed to adopt this provision of sec. 17 in pursuance of secs. 58 and 61 of the Act of 1862, but nothing appears as to this in the reports.

The first case in which the point was definitely presented for consideration was *The Fanny M. Carvill*, on appeal. It was tried before Sir Robert Phillimore in 1875, and that learned Judge seems to have had three separate cases before him at the same time which involved this section 17. All were reported under the name of *The Magnet* in L.R. 4 Adm. & E. 417. *The Magnet* was a Swedish steamer which had been in collision with a British vessel. Both had infringed the regulations, and both were held to blame. *The Magnet* was blamable not on any presumption merely arising from an infringement of a regulation, which might, or might not, have contributed to the collision, but for a proved disregard of the steering rules which, undoubtedly, was the main cause of the collision. Sweden had, before that time, adopted the British regulations, and a proclamation had been made under sec. 58, as appears in *The Scotia* (*supra*) and in *Abbott on Shipping* (14th ed.), p. 1201. This does not appear in the report in L.R. 4 Adm. & E. 417, and may not have been in evidence, but it would, as a fact, account for the application of the regulations at all to *The Magnet*, a foreign vessel. *The Magnet* did not raise the present question at all, and at p. 426, Sir Robert Phillimore, while proposing to confine "the absurdity and injustice" which would follow a literal construction of the sec. 17, observes—"I say nothing as to the injustice of applying such a construction of an English Statute to foreign vessels."

In *The Fanny M. Carvill* this learned Judge found that *The Fanny M. Carvill*, an American vessel, was wholly to blame, for

(*i*) 8 P.D. 18.

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steering a wrong course, but that *The Peru*, a Swedish vessel with which she had been in collision, had not infringed any regulation within the true meaning of sec. 17. It has already been shown, for the reasons stated in *The Scotia* and *The Nevada*, that America had consented to come under the regulations, which, probably, would account for a decision without protest against a foreign vessel for a collision on the high seas in this case. So far as *The Peru* was concerned the present question was not there raised, and it would have been unimportant if it had been, since that vessel was acquitted of any infringement.

There was an appeal in *The Fanny M. Carvill* to the Privy Council, as has been said. A report of the case there is to be found in the notes to *The Glamorganshire* (*k*). This appeal decision is a standard one on the true interpretation of sec. 17 of the Act of 1873. It occurred in June 1875, and their Lordships dismissed the appeal and affirmed the judgment below.

Hereafter I shall have to consider this decision in another connection, but it is important in the present controversy, because it appears that the point involved was definitely raised on the appeal, but at p. 460 their Lordships say—"Applying this construction to the facts found their Lordships are of opinion that if in this case both vessels had been British ships the *Peru* could not have been pronounced in fault. This conclusion renders it unnecessary to consider whether this particular clause in the Statute is applicable to foreign vessels—whether in other words it falls within the principle enforced in *The Amalia* (*l*) or that enforced in *The Saxonia* (*m*). That this question, which is not free from difficulty, will have to be determined at no distant date is highly probable. But their Lordships abstain the more willingly from considering it at present because it was not very fully argued before them." So, up to then, the highest court of the realm, so far as this State is concerned, regards the question as open and debatable. I would gather that their Lordships had not had presented to them the line of decisions to which I have referred, and the more so because I venture, with much respect, to suggest that so far as the class of case which was before them was concerned, there is no difference

(*k*) 13 App. Cas., p. 455. (*l*) Brown & Lush. 150.
(*m*) 1 Lushington 410.

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between the decisions in *The Saxonia* and *The Amalia*, but a complete agreement, for the reasons which I have given when discussing those authorities.

I think it is very important, in view of the matter-of-course fashion in which the Courts have dealt with collisions on the high seas between British and foreign vessels, and between foreign vessels only, as in the case of *The Magnet*, *The Fanny M. Carvill* (*supra*), *The Lovebird* (*n*), *The Khedive* (*o*), *The Koning Willem I.* (*p*), and some others, to remember that the countries of all the foreign ships involved in those actions had adopted the British regulations under sec. 58 of the Act of 1862, or of sec. 424 of the Act of 1894, as appears in *Abbott on Shipping* (14th ed.), p. 1201; and, although so much is not said in the reports of these cases, it is reasonable to believe that as all parties knew that, this question was not raised because the default was clearly provable under the regulations, and did not need any presumption. And this is more probable because, when the question is raised, the Lords of the Privy Council in *The Fanny M. Carvill* declare the dictum to be by no means certainly applicable to foreigners. This, too, would explain the otherwise singular occurrence of a British Court applying the British collision regulations in some of these cases to ships *both* of which were foreign. Of course, where any foreign power consents to be bound by the regulations, the Act expressly provided (sub-sec. 51) and now provides (sec. 424) that as to such regulations the ships of the foreign country so adopting them are to be treated in British Courts "as if they were British ships," which explains the application referred to above of the British regulations to litigant ships, both being foreign.

In 1877 the question was raised distinctly in *The Englishman* (*q*), and Sir Robert Phillimore appears to have assumed that sec. 17 of the Act of 1873 might apply to a French ship in collision with a British ship on the high seas. His Lordship gave this question little or no consideration, because, assuming that it might so apply in appropriate circumstances, he held that the French vessel's infringement of the regulations could not—following the rule laid down by the Lords of the Privy Council in *The Fanny*

(*n*) 6 P.D. 80.
(*o*) 5 App. Cas. 876.
(*p*) [1903] P. 114.
(*q*) 3 P.D. 18.

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M. Carvill (*supra*)—by any possibility have contributed to the collision, and that therefore the 17th section of the *Merchant Shipping Act* 1873 did not apply. His Lordship purports to be following the Privy Council in *The Fanny M. Carvill*, and his judgment does not in any way disturb their Lordships' expressed doubts as to the applicability of sec. 17 to foreigners at all. Since that decision the question has not, singularly enough, come up for decision till 1903, and then it became again unnecessary to decide it. I was also referred to *The Leon* (*r*). I do not think it helps the decision of this question, except that it holds on demurrer that where a British and a foreign vessel come into collision on the high seas it is not the law of either country which is to determine liability, but the general law maritime as admitted in the forum in which the litigation is brought. Being a demurrer the question of the effect of the Statute could not be and was not considered.

In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (*s*), decided in 1882, some general expressions are used by the Court which, so far as they go, fall in with what appears to me to be the unbroken principle of decision.

The next step in the present discussion is the passing of the *Merchant Shipping Act of* 1894. That Act appears to have made no very substantial difference in the Act of 1862, as altered by the Act of 1873, except in the direction of rearrangement and literary beauty, as is to be expected of, though often not the case in, a consolidating Act. Sec. 418 (1) practically reproduces sec. 25 of the Act of 1862, though some consequential amendments are made and redundancies are cut out; (2) is also in substantial effect sec. 57 of the 1862 Act, tastefully pruned; sec. 419 (1) and (2) are substantially sec. 27 of the 1862 Act; (3) is sec. 28 of that Act in effect; (4) is sec. 17 of the Act of 1873 unessentially slightly altered.

I omit certain sections not important in this case, and I find that sec. 422 is identical with sec. 16 of the Act of 1873 with some rearrangement and numbered subdivision, except that the words "of a British vessel" are omitted from sub-sec. (3) of the new Act. This is remarkable, but it seems to have been so omitted, not for the purpose of necessarily applying the section to foreign vessels at

(*r*) 6 P.D. 148. (*s*) 10 Q.B.D. 521.

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large, but in order to remove any embarrassment if any foreign vessel should elect to adopt the provisions of sec. 422 under the power given by sec. 424, or in other words to make it applicable to foreign vessels as well as to British ones if the proper proclamation should be made under sec. 424 to produce that effect. Then sec. 424 is sec. 58 of the Act of 1862, somewhat altered, in an important way as it seems to me.

The whole of Part V. of the Act in which these sections occur is headed:—

"Safety.

"*Prevention of Collisions.*"

There appears, therefore, to be very little in this latest legislation to make the chain of decisions to which I have referred in any degree inapplicable.

Since the coming into operation of that Act the point now material has been, so far as appears, raised once only. In the case *The Koning Willem I.* (*t*), it was distinctly presented for decision, but Bucknill, J., having found as a fact that the foreigner, a Netherlands steamer, had distinctly on the evidence contributed to the collision, and so was a ship in fault, and as it appeared that her Government, the Netherlands, had under sec. 424 of the *Merchant Shipping Act* 1894, adopted the British regulations (see p. 118), it became unnecessary to decide whether sec. 419, sub-sec. (4), which had not been so adopted, applied to her.

One may finish the discussion as one began it by repeating that no British legislation is to be held to apply to British and foreign ships which come into collision on the high seas unless it clearly and distinctly is so applied. All the authorities reiterate and insist on this principle, and scrupulously observe it through all the phases of legislative change which have accrued since 1854, and in my opinion sec. 419, sub-sec. (4), does not apply to such cases respecting Italian ships unless the inherent terms of the Act of 1894 clearly and distinctly enact that it does.

I now propose finally, on this particular point, to see what these collated sections do enact as to foreign ships on the high seas. Part V. by sec. 418, sub-sec. (2), makes express provision that "the collision regulations together with the provisions of

(*t*) [1903] P. 114.

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this part of this Act relating thereto and otherwise relating to collisions"—that is, the three classes of enactment which are stated in apposition—shall all be observed by "all foreign ships within British jurisdiction; and in any case arising in a British Court concerning matters arising within British jurisdiction foreign ships shall so far as respects the collision regulations and the said provisions of this Act, be treated as if they were British ships." This therefore applies everything in the Act relating to collisions absolutely to foreign ships which have infringed them within British jurisdiction.

Then follow a series of sections—419 and 420, which appear to be "provisions relating to the collision regulations," and 421, 422 and 423, which appear to be "provisions otherwise relating to collisions." There may be others further on, but these will suffice. Then sec. 462 is another section in Part V. which is expressly applied to foreign ships which load cargoes at some port in the United Kingdom and are unsafe whilst at that port from overloading.

But sec. 424 plainly recognizes the principle that the British Legislature has practically, and morally, the right to legislate for its own people only, or for foreigners who are within British territory and jurisdiction, because, so far as any application of the legislation of Part V. to foreign ships "beyond the limits of British jurisdiction" is concerned, that section offers expressly a choice to any foreign country as to whether it is willing that "the collision regulations" or "the provisions of this part of this Act relating thereto," or "otherwise relating to collisions," or "any of these regulations" or "provisions," "should apply to the ships of that country." Here, then, differently from the application of all those several classes of enactment to foreign ships "within British jurisdiction," by sec. 418, sub-sec. (2), there is offered, disjunctively, a choice of all, or either, or any part of either the regulations or provisions mentioned. Then when Her Majesty in Council is satisfied that the Government of a foreign country is willing that all or parts of any of these enactments offered to its choice should apply to its ships when beyond the limits of British jurisdiction, "Her Majesty may by Order in Council direct that those regulations and provisions" (which must mean such of them as are

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chosen by the foreign Government) "shall subject etc. apply to the ships of the said foreign country whether within British jurisdiction or not and that such ships shall for the purpose of such regulations and provisions be treated as if they were British ships."

In the present case, the only evidence given on this point is the Order in Council, and it shows clearly that the Kingdom of Italy was willing the collision regulations should apply to Italian ships beyond the limits of British jurisdiction, and that Her late Majesty made an Order in Council accordingly as to the *regulations* only.

It never could have been intended by the Act that this choice having been made and proclaimed it should have any such effect as to apply to Italian ships beyond the limits of British jurisdiction all, or any, of the provisions of Part V. of the Act, which Italy has never expressed willingness to have so applied.

On this argument sec. 724 seems to have a strong bearing as showing that while each and every collision regulation or provision in Part V. is expressly placed at the choice of foreign countries, and by other sections of the Act a choice is similarly given as to other things (see sec. 238), authority is given by sec. 734 to Her Majesty in Council to apply any other provisions of the Act to the ships of any foreign country which desires that they shall be so applied.

For all these reasons I am of opinion that sec. 419, sub-sec. (4), does not apply to the *Figari* if it be a provision "relating to the collision regulations," or "otherwise relating to collisions," and is not merely "a matter of procedure," "a rule of evidence," so as to make it a part of the *lex fori* of this Court. I have already shown that wherever this point has been raised hitherto, and it has been often raised as to the secs. 298 of the Act of 1854, and sec. 29 of the Act of 1862, and sec. 17 of the Act of 1873, it was either overruled or disregarded, and in *The Koning Willem I.* (*u*), it was raised as to this very sub-section, and no attention was paid to it, though if it were merely a rule *legis fori* that would have saved much trouble.

Counsel reminded me of the comprehensive definitions of *lex fori* in *Dicey on the Conflict of Laws*, 712, and in other text-books.

(*u*) [1903] P. 114.

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Taking, however, Mr. Dicey's principle, which is well authenticated, it is :—" Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case." In my opinion sec. 419, sub-sec. (4), is of this latter sort. It uses, it is true, the words " shall be deemed to be in fault," which suggests at first sight an inference of mere evidence, but the real effect of the sub-section is this: the thing to be proved, as a matter of procedure, is that a collision regulation has been " infringed," and when that is shown then it follows, subject to the proviso, as a penalty, that the infringer " is in fault," with all the consequences of that condition. Is not this a most substantial interference with a foreigner's natural rights, if he has not been brought under sec. 424 ? By the general law maritime a foreign ship injured in a collision on the high seas would be entitled to recover every penny of her loss (I omit the question of limited liability), unless she were affirmatively proved to have actually caused the collision in whole or in part. If sec. 419, sub-sec. (4), applies to her, it substitutes for that right a rule that, if it can be shown that she has infringed any regulation, which infringement might by any possibility have contributed to the collision, though it could be shown that it in fact did not, she must be found to have done so, and must be obliged to bear half her loss herself. This seems to me to be a very substantial interference with her rights, and not a mere matter of procedure. It was so held by Wood, V.C., in *Cope* v. *Doherty* (*v*), and in *The Gaetano & Maria* (*w*) Brett and Cotton, L.JJ., at p. 144 and 149, discuss a somewhat similar question in a way which seems to apply here. In that case the question was the validity of a bottomry bond, and it was admitted that it would be bad unless there was such a necessity as warranted the giving of it, and in the case of an English ship the necessity would not have existed, because it appeared that the captain could, before giving the bond, have communicated with the owners, and did not do so. Brett, L.J., then considers whether this principle could apply to an Italian ship. It was argued that the thing to

(*v*) 4 K. & J., at pp. 384 and 390. (*w*) 7 P.D. 1.

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be proved was whether there was a necessity which gave the captain the right to hypothecate, and that as that was a matter of procedure it was to be governed by the law of the *forum*. His Lordship then said this—"That raises the question whether this is a matter of procedure. It is said it is because it is a matter of evidence. Now the manner of proving the facts is matter of evidence, and to my mind is matter of procedure, but the facts to be proved are not matters of procedure; they are the matters with which the procedure has to deal. Here the facts which are to be proved in order to give the captain the authority are not the evidence of those facts. The thing to be proved cannot be evidence of the thing which is to be proved, and therefore it seems that this is not a matter of procedure to be governed by the law of the *forum*." Cotton, L.J., takes a similar view. Now the thing to be proved here is this: Was the *Figari* in fault wholly or partly, so that the consequences already ascertained by law shall, or shall not, be laid upon her? The whole evidence of that is proof of an infringement as above limited. That being proved, the consequences on her rights are substantively allotted by the sub-section.

Counsel also relied on *Dowell* v. *The General S.N. Co.* (*x*), where it was held that a similar section to sec. 298 of the *Merchant Shipping Act* 1854 need not be pleaded, "because it only gave a rule of evidence." In my opinion the great weight of authority is, as I have shown, against that view. I do not think, therefore, that sec. 419, sub-sec. (4), is, in its nature, a mere rule of the *lex fori*. I think, also, that if it were such a rule, occurring as it does as one of the provisions of Part V., which part itself gives to the Kingdom of Italy a choice to be, or be not, bound by any provision of that Act relating to the collision regulations, or otherwise relating to collisions, or any of those provisions, the intention of the Legislature was that Italian shipowners were not to be bound by this sub-sec. (4), which, in respect of collisions on the high seas, would so seriously alter their rights, unless their Government affirmatively accepted that provision, whether it be a rule of evidence, intrinsically, or not. Its applicability was made part of an international bargain by the Act itself.

(*x*) [1855] 5 El. & Bl. 195.

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This decision, if it be correct, would make an end of the legal contentions in this case. The other views, however, which have been presented to me so earnestly and industriously, on the assumption that sec. 419. sub-sec. (4), does not apply to the *Figari*, are so important that I propose to consider them too.

If the sub-section does then apply to the *Figari*, the true interpretation of it is laid down by the Privy Council in *The Fanny M. Carvill* (*y*). After eliminating what appeared to be unreasonable extravagances of the literal language of the sec. 17 of the Act of 1873, their Lordships give the utmost reasonable meaning which the generality of the words admits of, and declare that the section excludes proof that the given infringement which might have contributed to the collision, did not in fact do so, and throws on the party guilty of the infringement the burden of showing that it could not possibly have done so.

This rule has been universally accepted by the Courts as the true one; but in several cases since, the character, and extent of inquiry, and proof, and deduction, which is admissible to the infringer, to show that his infringement "could not possibly have contributed to the collision," have been much discussed.

If in the present case it were legally open to me to find by inference, as a jury ordinarily might, whether the sounding of the *Figari's* fog-horn by mouth, instead of by mechanical means, contributed in any degree to the collision, I would without hesitation find that it did not, for special reasons to be presently stated, as well as because I am satisfied that the *Coogee's* people, on that dark, foggy night, were not bothering about fog-horns or their blowers; they were recklessly confident that they would not meet any ships, and therefore boomed ahead at full speed, not taxing their ears to pick up faint or distant sounds of warning, as they should have been doing. The mouth-blown fog-horn was in fact better in effect than when it was blown by mechanical means, and I feel sure that, the former not having been heard, the latter would not have been. That is my personal opinion; but if it might "by any possibility," within the meaning of *The Fanny M. Carvill* rule, have been heard, then my opinion that it would not is unimportant. By that rule, however, the "might

(*y*) 13 App. Cas. 455.

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have" may be rebutted by proving negatively that the infringement "could not by any possibility" have contributed to the collision. Now what is the nature and extent of the "possibility" there indicated? Does it mean a condition which of itself necessarily excludes physically the operation of the human senses from misguidance by the infringement; or does it admit of the consideration that in the circumstances which prevailed at the time of the collision no one would reasonably suppose that the observance of the rule would have produced better result than the non-observance of it.

The Lords of the Privy Council in *The Fanny M. Carvill* insist that as sec. 17 of the Act of 1873 was substituted for sec. 298 of the Act of 1854, and for sec. 29 of the Act of 1862, which provided for penal consequences whenever it appeared that the collision was occasioned by an infringement of the regulations, it must exclude any necessity by the party alleging the infringement to show that the infringement did in fact occasion the collision, because that would be a reversion to the former enactment. They also insist that the effect of sec. 17 was not merely to shift the burthen of proof, by raising a presumption of culpability from the infringement, which might be rebutted by proof that the infringement did not in fact contribute to the collision. This warns against drifting back to the old enactment by permitting either party to raise the issue, did the infringement, or did it not, occasion the collision. Then the rule laid down as the true one raises a sort of estoppel against showing what really was the result of the infringement, unless the infringer can show that the infringement could not by *any possibility* have contributed to the collision. Then where and when does the inquiry as to the character of this impossibility end?

In *The Fanny M. Carvill* the two ships were close hauled, on opposite tacks. *The Carvill* had to keep out of the way, and *The Peru* to hold her course. It was said for *The Carvill* that, seeing the red light of *The Peru*, *The Carvill* was intending to get away from her, but that she suddenly showed her green light, which indicated that *The Peru* was leaving her course to run before the wind, and that *The Carvill*, therefore, held on her course, intending to let *The Peru* pass on. It was then said that *The*

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Peru then luffed up into the wind as if she were intending to go about, or to return to her former course, and that *The Carvill* inevitably ran into her. This was disbelieved, but it appeared that *The Peru's* screens for her lights were a foot or so too short, and it was contended that this infringement allowed her green light to show across her bow to the port side, and therefore, although she was found to have never manœuvred as *The Carvill* alleged, the question arose had she misled *The Carvill* by showing a false light through her defective screens. The Court inquired into the effect of the short screens, and found that they were an infringement of the sailing regulations; but having considered evidence as to the original positions of the ships, and their manœuvring as found, the Court held that the green light was so far screened by its screen, such as it was, that that light not only did not show, but that it could not by any possibility have showed across to the port bow of *The Peru*, and therefore held that the infringement was in that case immaterial. Now that inquiry investigated all the circumstances which would have been investigated if the issue had been "Was the collision occasioned by the infringement?" but having satisfied itself that, in the conditions thus established, the green light before it could show to port must shine through a wooden board, the Court naturally decided that that was not physically possible, and so discharged *The Peru*.

The next typical authority of which I am aware is *The Englishman* (z). In this case a French trawler, *L'Etoile*, on the high seas, was paying out her net while beating close-hauled to windward; her regulation lights were removed so as not to interfere with the run of the net, but she hoisted instead a white globular light at her masthead, and showed small white lights from her deck from time to time and also flare-ups. *The Englishman* came along before the wind and did not observe the *L'Etoile* till she struck her. *The Englishman* was clearly in default for not keeping out of the way, and for not having a look-out, as the Court found. It was, however, contended that *L'Etoile's* regulation lights not having been shown she had infringed the regulations, and so should be deemed to be in fault too. Sir Robert Phillimore there-

(z) 3 P.D. 18.

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fore proceeded to see if she came within sec. 17 of the *Merchant Shipping Act* 1873, according to the rule in *The Fanny M. Carvill*, and he examined all the circumstances as he would have done if the question had been—"Was the collision occasioned in part by the absence of the *L'Etoile's* lights?" and he held that as *The Englishman* had no look-out, the side lights of the *L'Etoile* would not have been seen on board her, any more than the globular masthead light which the *L'Etoile* did exhibit, and thereupon His Honor found that the absence of the side lights "could not by any possibility have contributed to the collision," and that therefore the 17th section did not apply, and that *The Englishman* so was wholly to blame.

Now here we have another sphere of possibility altogether brought into the inquiry. In *The Fanny M. Carvill* the unanswerable physical impossibility of seeing light through a wooden board was the determining point. Here the point was a corollary to the proposition that, there being no look-out watching for any lights, the colour or position of lights could make no difference. The one was as little likely to be seen as the other. This, however, opens up the large area of human negligence, as distinguished from physical impossibility. Thus, if there had been a man to look out, and he were asleep, or drunk, or deeply preoccupied, or wholly regardless of his duty of looking out, the result would have been the same.

Then came, in order of date, a case with a name so long and unpronounceable, that a regard for time, and the instinct of self-preservation, have concurred to call it *The Khedive* (*a*). It was finally decided in the House of Lords, and the rule in *The Fanny M. Carvill* was fully adopted. Two steamers were approaching one another, and one of them suddenly altered her helm so as to cause imminent risk of collision. The other was being skilfully handled, and on the above change occurring, the officer in charge ordered the engineer to stand by, instead of stopping and reversing, as required by the 16th collision regulation. A collision occurred. The Court held *The Voorwaarts* (the former steamer) to blame for the collision, but it also held that *The Khedive* (the latter steamer), having infringed the regulation by not stopping and reversing,

(*a*) 5 App. Cas. 876.

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not only might have contributed to the collision, but actually did so, and held her "in fault" also, under sec. 17 of the Act of 1873. Here again the whole circumstances were exhaustively analyzed, and the Court held that human self-sufficiency, though very well meant, infringed the prescribed regulation and in fact contributed to the collision, and the whole matter was judged by the actual effect of the infringement in bringing about the collision.

The next case, *The Lovebird* (b), takes the rule very far indeed. A sailing ship and a steamer were on the high seas in a fog. The sailing ship had no fog-horn on board worked by mechanical means, but she was blowing a mouth fog-horn, at proper intervals, and a proper number of blasts. These were heard on board the steamer, which, notwithstanding, disregarded them, and, playing her part quite wrongly, ran into the sailing vessel. Sir Robert Phillimore held that, having regard to the rule in *The Fanny M. Carvill*, he was unable to come to a conclusion that "by no possibility could the sounding of a mechanical fog-horn have prevented the collision or that it would not possibly have given more warning to the other vessel," and he held the sailing ship to be also in fault under sec. 17 of the Act of 1873. Now the whole object of a mechanically blown fog-horn being insisted on is that it may be more surely heard. But the fog-horn in this case was fully heard and disregarded. If *The Lovebird* heard and chose to disregard the one fog-horn, what was there to suggest that she would regard the other even if she should hear it better. This case seems to depart from *The Englishman* a good deal, but both were decided by the same learned Judge.

There is then the case of *The Duke of Buccleugh* (c), in the Court of Appeal, and [1891] App. Cas. 310. Here a steamer had been in collision with a sailing ship. The former was found to blame for the collision. It was also found that the foresail of the ship at times, in a certain trim of her sails, in part obscured one of her side lights. The question then arose did this infringement of the collision rule 6 bring her within sec. 17 of the Act of 1873. Both appellate Courts recognized the rule in *The Fanny M. Carvill*, and proceeded to apply its test. The learned Lords all appear to hold that everything is open in such an inquiry as

(b) 6 P.D. 80. (c) 15 P.D. 86.

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to the circumstances of the collision; but that it rests on the infringing vessel to show, negatively, that the infringement could not, by any possibility, have contributed to the collision; that sometimes this is easy, but is sometimes impossible, but whenever the proof does not amount to an absolute exclusion of a possibility of contribution, the infringer is within the section, and cannot escape its consequences, except by its own proviso, if that proviso can be satisfied. This appears to me to also agree with the decision of the Privy Council in *The Hochung* (*d*). This would also make *The Lovebird*, though an extreme case, consistent. In *The Duke of Buccleugh* it was found that, the relative positions of the two vessels having been established, the obscuration of the light could not have affected the collision any more than if it had not existed. I think therefore that as *The Lovebird* is a decision of the same learned Judge who decided *The Englishman*, and is later in date, I should regard it as removing any doubt which may have been occasioned by the earlier case, if, indeed, there be any. And, as I understand *The Duke of Buccleugh*, I should, by clearly established facts, be able, negatively, to determine that by no possibility could the worse machine-blown fog-horn have been heard by the *Coogee* when she failed to hear the better-blown mouth one. I am unable to do this, even though I cannot personally present to myself any affirmative possibility by which that result might have happened. "There are more things in heaven and earth than are dreamt of in my philosophy." Counsel cited a number of American decisions on a precisely similar regulation, and all put the matter to the like effect. They are—*The Martello* (*e*); *The Niagara* (*f*); *The Bolivia* (*g*), and others. A recent case in Ireland also puts this principle very distinctly—it is *Boucher* v. *The Clyde Shipping Co.* (*h*).

The next contention is that, assuming that the sec. 419, sub-sec. (4), does apply to an Italian ship which has been in collision with a British vessel on the high seas; and assuming that the admitted infringement of collision regulations, article 15, in the circumstances, brought the *Figari* within the sub-section, yet

(*d*) 7 App. Cas. 512.
(*e*) 153 U.S. Rep. 64.
(*f*) 84 Fed. Rep. 962.
(*g*) 49 Fed. Rep. 169.
(*h*) [1904] 1 I.R. 129.

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The Figari should be acquitted of its consequences because the circumstances of the case made a departure from the regulation necessary.

The material facts on this question are these:—*The Figari* was purchased by her present owners at Hamburg three years ago. She was at that time a British ship. She was provided with the fog-horn now in question at that time, and it was an instrument approved by the Board of Trade. The captain of *The Figari* has always had it on the voyages which he has made since then. He also provided the ship with two other fog-horns, to be used by mechanical means; one with a bellows, the other an American one, more complicated, and worked by two handles, not in evidence. He had used one of these on a voyage to Japan, and had found it so entirely inferior to one in use on the morning of the collision, however used, that he discarded it, except that after the former was injured in the collision the latter was used while the vessels were getting together for the towing, and afterwards until the fog cleared off during the afternoon of the 25th December. It was used then because there was nothing else that could be used. The other American horn had previously got out of order, rapidly apparently, because Fabiano, the chief officer, had tried to repair it, and had failed, and it was not thereafter used. Captain Schiafino says, in his cross-examination—"I had two fog-horns approved by the Board of Trade in good condition." If he meant to apply this statement as on the 24th December it must be a mistake, because the detailed evidence of Fabiano is otherwise. The evidence as to the fog-horn actually used is that it was in good order when *The Figari* left Philadelphia in June 1903. It was used on the voyage thence to Adelaide and Melbourne —the particular date cannot be stated—and worked well. It was not again used until the 19th December and 20th December, after *The Figari* had started from Melbourne on her voyage to Newcastle, during foggy weather. It then attracted Captain Schiafino's attention as being defective, because when used mechanically it sometimes acted properly, and sometimes failed altogether, and sometimes gave a blast that lasted a less time than it gave when mouth-blown. He therefore, knowing well the International rules, as he says, and desiring to be sure that he could comply with

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them, ordered his chief officer to test the fog-horn both ways. Fabiano got it ready by greasing the leather washer of the pump, so as to make it swell and fill the cylinder, and so exclude the passage of air except through the horn. It was just an ordinary single pump. In the cross-examination of the witnesses it was suggested that its "valve" was out of order. It has no clack valve or other valve like a water pump. It is a metal cylinder about three feet high with an opening near its bottom into which a metal conical horn is screwed in the narrow end of this cone, which so screws on to the cylinder. There is what is called the reed, a device whose vibration produces the loud bleating sound given out by the horn. A piston, whose distal end consists of a metal disc to which is attached a leather washer goes down the cylinder, fitting its inner surface closely to prevent air escaping upwards. The piston's proximal end, on which is a round knob, passes through a metal cover which screws tightly down on the cylinder. In this top there are some holes which allow the air above the piston's disc to escape, and so allows its upward stroke to be easily drawn, while the only outlet for the air when compressed by the downward stroke is through the reed and horn, through which the backward draught of air for the next blast is also drawn. Fabiano tried it first in the cabin, but the captain, thinking that was not a proper test, ordered him to take it to the forecastle and to get a seaman to use it there, while he, the captain, stood at the opposite end of the ship to listen. It was then worked mechanically for eight or nine minutes, and the captain found that, as before, while it sometimes gave a very good sound, it sometimes broke down altogether, and sometimes gave some sound, but a very defective one. He then caused the horn part of it to be blown by mouth, and he found it stronger and more sustained, and, of course, that each successive sound was as good as the last. He then resolved that it would be dangerous to use it mechanically, and ordered that it should be blown by mouth, and so it was throughout the fog up to the collision. There is no doubt in my mind that this experiment was in fact made, and was honestly made, and made with the instrument in as good working order as it could then be placed, and that the master caused it to be blown by mouth, not from any pragmatical dislike of the regulation or of the

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mechanism, but because he really found it to be then defective, as compared with the mouth process, for carrying out the distinctive requirements of article 15 of the regulations, and also because he failed to discover any defect which could be amended, and so make the pump reliable. (His Honor then dealt with certain experiments made with the fog-horns by witnesses, and by himself, and continued.) This made it plain to me that while for a simple succession of sounds the machine-blown blasts would be good enough, seeing that if one blast was ineffective another good one might be made to follow, the instrument thus worked would be exceedingly dangerous where it was necessary to produce with certainty two successive long-sustained blasts, to indicate that the ship was on the port tack, and three successive well-defined sustained blasts, to indicate she was before the wind. It could not be relied on to produce these effects, while mouth-blown it could be so relied on, and produced at least an equal volume of sound.

Then did all this constitute a "necessary departure" from the rule of sec. 419, sub-sec. (4)? It was argued that it did not—(1) because witnesses for the defence asserted that the piston-washer must have been allowed to become dry and that it should have been soaked a long time in water before use, or else in tallow, to soften and expand it. The master answered this by saying that if the washer had been allowed to become dry the piston would simply fall by allowing the air to escape backwards, which did not occur; and also that it had in fact been well tallowed and produced a well-sustained resistance to pressure, and that therefore its defect was not attributable to that cause. (2) It was also argued that the master had been negligent in not causing the fog-horn to be looked to and put in order before he left Melbourne for his voyage, and counsel relied on an American decision, *The Niagara* (*i*), as an authority that such a course is obligatory on the master of a ship. In that case the ship's fog-horn had been tested before she left Philadelphia for Havana in order to decide a controversy as to the relative merits of the ship's fog-horn and another of different make, and the ship's fog-horn was found all right. The learned Judge thought such a test insufficient,

(*i*) 84 Fed. Rep. 902.

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though I do not know why it should be. The ship lay at Havana 43 days and then left on her return voyage without again testing, and during that voyage when the fog-horn came to be used it was found defective, and so it was thereafter necessary to use a fog-horn blown by mouth, up to the collision. The Court held that this was so negligent as not to be admitted to the excuse of "necessity." There is no evidence in that case as to the actual condition of the mechanism, or that it was as simple as that in the present case, or that any ordinary care was taken as in the present case to make the washer work close. Indeed, for anything that appears in that case the sounding reed might have been broken.

In the case of *The Chilian* (*k*), in circumstances very like the present, the use of a fog-horn by mouth was held to be a "necessary departure." So in *The Trave* (*l*), another American case, it was similarly held that the regulation had been complied with by providing an efficient fog-horn, to be blown by mechanical means, and that there was no duty to have two on board; that a defect was found to have arisen during the voyage which could be fairly attributed to something going wrong by its use on that voyage, and not from negligence of the navigators; that the captain was unable to remove the defect, and that he substituted an effective mouth-blown horn, and that the ship should be therefore excused.

There is no express obligation on the master of a ship to have his fog-horn overhauled by an expert mechanic every time he leaves port, and, in my opinion, it does not amount to negligence that when the fog-horn appears to be quite right, and shows nothing to suggest doubt, the shipmaster does not send it to a mechanic to overhaul it. The *Merchant Shipping Act* does expressly require shipmasters to have their compasses tested and corrected "from time to time," but a captain does not have his vessel swung every time he leaves port, nor anything like it, unless, of course, he has some reason to suspect the accuracy of his compasses. He is required to be efficiently equipped in many respects, but no one thinks it reasonable to demand that all his details of "efficient equipment" shall on the eve of every departure be tested, when there is nothing to excite doubt or suspicion about them. No one has to this hour indicated anything about this fog-horn which

(*k*) 45 L.T. (N.S.) 623. (*l*) 68 Fed. Rep. 390.

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should suggest anything wrong with it, or to account for its defective operation in the midst of this last voyage. There have been abstract suppositions, to which I have already alluded, but no one has pointed out anything unusual in its construction or condition to admit of any escape of air, or to suggest any other cause for its present intermittent defective sounding. I have scrutinized the whole thing closely, but there is no sign of insufficiency or inequality in either the cylinder or the washer, or in the line of the piston's thrust; nor is there any air escape to be felt or heard. I would say that any person, not knowing that there was anything wrong with it, would never suspect it, and, if he tried it, he might well succeed in getting several perfect blasts from it, when mechanically used, and then suddenly produce a complete failure. I do not think that the suggested negligence was any.

A series of other cases were cited to me for the defendants—*The Lovebird* (*m*); *The Energy* (*n*); *The Catalonia* (*o*); *The Bolivia* (*p*); *The Martello* (*q*); but in all these cases the ship masters have never attempted to comply with the regulation at all. He had no fog-horn blown by mechanical means as required. This is quite inadmissible. No one is at liberty to make his own choice as against the statutory dictate, and if he insists on doing so, then there cannot be any excuse for him. In the present case Captain Schiafino did supply himself with an efficient fog-horn, which broke down at sea; and there is no reason to suppose that he spent money in complying with the regulations for the purpose only of not using the machine, and obstinately adhering to a "fad" in favour of a mouth-blown horn.

In my opinion the evidence all shows that he acted with honest intent to observe the regulations; that he was not, in all the circumstances, negligent in respect of his management of the fog-horn; and that he did the very best he could to make the most of it when it became defective; and I find that "the circumstances made the departure necessary" within the meaning of sec. 419, sub-sec. (4).

(*m*) 6 P.D. 80.
(*n*) 42 Fed. Rep. 301.
(*o*) 43 Fed. Rep. 396.
(*p*) 49 Fed. Rep. 169.
(*q*) 153 U.S. Rep. 64.

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The principle of *The Benares* (r), justifies, in my opinion, the master for not having run the risk of the defective horn when he discovered its defect. It is entirely desirable that every rigour shall be insisted on to make shipmasters careful not to attempt to set themselves up against the command of the statute; but it is *not* desirable to push the matter so far as to make them actually court danger by a dread of honest departure from the rule, when wisdom and good faith fairly demand such departure. The final result is that *The Coogee*, being wholly to blame for the collision, I condemn her accordingly.

There is one important item claimed, *inter alia*, which has been challenged. When the *Figari* left Melbourne on the 18th December 1903, she was under charter to proceed to Newcastle, and to here load coal for Honolulu. She was proceeding to Newcastle in pursuance of her charter when she was disabled by the collision, and was forced to put back to Melbourne, where she was long detained, in fact for 117 days. She sailed again for Newcastle during the trial of the action, on the 20th April 1904.

The plaintiffs originally claimed "800*l*. or 900*l*.," by the evidence of Schiafino, as for the loss of the profit on their charter which they would have made but for the collision.

It was objected that the charterer might still consent to adhere to the charter, and in that case the plaintiffs would have the profit twice over. Later in the trial it appeared that the charterers, in fact, were willing to go on with the charter. The claim for the profit was then given up, but the plaintiffs still insisted that they were entitled to damages, in connection with the charter, in the following way:—

Newcastle is a very busy port, and the coal shoots for loading vessels with coal are limited in number. When there is a great demand, vessels calling there to load have to wait their turn for the shoot, and sometimes for a long while.

It is admitted that but for the collision the *Figari* would have reached Newcastle by the 31st December 1903. In that case she would have been loaded by 24th January 1904, because she would have got to the shoot then almost at once. As it is she reached Newcastle at a busy time, and she will not now be loaded until the

(r) 9 P.D. 16.

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27th June 1904. She had reached Newcastle and, after discharging her ballast, she was ready for loading on 11th May 1904, and it is admitted that she would have loaded in 24 days.

It therefore follows that the delays which ensued after the collision, from whatever cause, have brought it about that the *Figari* will now be kept idle awaiting her turn for 23 days, for which she would not have been idle if the collision had not occurred, and this represents, for profit, wages, and maintenance of the ship's company, 823*l.* 15*s.* 8*d.*, which the plaintiffs now claim.

The defendants have sought to answer this claim by showing that the contract for the repairs was accepted by the plaintiffs on the 7th January 1904, but, as there was no one in Melbourne to guarantee the price, the contractors declared they would not proceed, and as a result the *Figari* lost the chance of the dock, which first occurred on the 15th January. The dock continued occupied thereafter until the 7th March, when the *Figari* was taken into it.

If she had gone into the dock on the 15th January she ought, according to the contract time, to have been fully repaired about the 23rd February, for it took in fact 30 days to do the work after she was docked, although the contractors did in fact do a lot of work upon her while she was waiting for the dock, in the way of clearing away and preparing.

The guarantee was obtained and the contract signed on 4th March. The defendants then maintain that the delay from 7th January, when the contract was accepted, until the 4th March, when the plaintiffs had their money ready and the contract was signed by the contractors, a period of 57 days, was solely attributable to the plaintiffs, and that that delay exceeds the 23 days claimed for by the plaintiffs; and was the cause of the predicament which has brought about that delay of 23 days.

I think that on principle this claim cannot be sustained in the way in which it is put. The ordinary rule for measuring damages is that they must be confined to such as flow directly from and as an ordinary and reasonable consequence of the particular wrong complained of. This rule prevails in the Admiralty Court, as in all others. Now it is a result which flows directly from a collision and as an ordinary consequence, that the vessel injured will be

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prevented from earning her ordinary profits while she is laid up; and if she thereby lost a valuable charter because she could not perform it for that reason, she could recover the profit which she would have made, but the fortuitous delays and disadvantages which the special methods of business at a given port may entail on a ship which has not lost her charter, because she happens to arrive at that port earlier or later, is, I think, according to the authorities, too remote. It is essentially a special and peculiar consequence of the ship's delay, and not an ordinary one.

The rule of law must be one which applies to all ships generally, and only such damages as arise ordinarily and directly from the wrong to which the rule applies can be recovered, unless by some special condition of knowledge, or agreement, between the particular parties something else can be recovered as special damage. I therefore disallow this claim as thus urged.

Looking at it from another standpoint, however, I think that some of it is recoverable. All chance of other profit was closed to the *Figari* while she was under charter. Her duty was to proceed to carry out that charter at the earliest time she could and to take her chances at the port of loading. As that charter still stands good she cannot claim for any other profits because she could not lawfully have earned any. The effect of delay upon her profits could only be this, that it would prevent her by so much from reaching and discharging her coal at Honolulu and from earning new profits thereafter, but that is in my opinion too remote.

The *Figari* was, however, as a result directly flowing from the collision, compelled to remain in Melbourne for 117 days before she could proceed to fulfil her charter and earn her profits thereunder. All that time she had to pay and feed her officers and crew, to her disadvantage.

It has been contended in answer to the former claim that the plaintiffs are themselves to blame for 57 days of this delay in the way which I have already stated. I do not, think, however, that that is a correct view. The *Figari* was driven back to Melbourne for repairs by the wrong of the defendants.

A shipmaster does not usually carry about with him several thousands of pounds, and I think that he is entitled—if, indeed, he is not bound—to consult his owner as to whether he shall abandon

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to underwriters or repair; and if so how he shall find the money to repair. He must not, of course, loiter about this; but he is, I think, as against a wrongdoer, entitled to a reasonable time to ascertain what is to be done, and to provide the means. In my opinion it was certainly not an unreasonable time to take from 26th December 1903 to the 15th January 1904, which time included three Sundays and two holidays, seeing that the owners in Italy had to be and were consulted; that a survey had to be made, and the specifications had to be prepared, and tenders had to be called for, and when these came in after necessary time for tenderers to examine the specifications and to tender, it was necessary to discuss a contract, which was accepted at the earliest moment.

When the financing had to proceed, because it was then only that the amount to be provided became known, it was considered that the captain could not get money on bottomry in Melbourne, as appears from one of the cables, but he was urging his owners persistently by the necessarily inconvenient but only possible process of cablegram, giving them the necessary information when he himself had ascertained the probable cost of the repairs. Meanwhile the contractors did proceed with such of the repairs as they could do, out of dock, and for several days; and so no time was lost which could possibly be utilized. In these circumstances I do not think it can be fairly imputed to the plaintiffs that the chance of the dock on the 15th January was a loss by way of wrongful default of theirs.

Then they were ready and the ship went into dock on the first occasion thereafter that it became available for her, viz., the 7th March 1904. The repairs were then completed without any delay; and the *Figari* sailed for Newcastle as soon thereafter as she could be got ready for sea and could clear at the Customs.

In the interim the ship could not discharge her crew while she waited, specially as they were for the greater part foreigners, and doubtless engaged for the round trip.

I cannot therefore see why the plaintiffs are not entitled to be recouped for the bare wages and maintenance of the ship's company while thus reasonably waiting for repairs. I consequently allow them under this head of damage the sum of 250*l.*

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14s., being wages for 57 days at 95*l.* per month, together with maintenance of officers and crew, 72*l.* 13*s.* 6*d.*

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Solicitors for plaintiffs: *Moule, Hamilton & Kiddle.*

Solicitors for defendant: *Malleson, England & Stewart.*

W. H. M.

SYME v. UNITED VICTORIA PERMANENT BUILDING SOCIETY.

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June 10, 13, 14, 15.

Building society—Rules—Construction—Rights of priority—Matured shareholder—Withdrawing shareholder—Society in financial difficulties—Stoppage of regular business—Rules ceasing to operate—Right to payment in full—Deduction for losses from amount at credit of shares—Cessation of membership—Alteration of rules aimed at particular member—Building Societies Act 1890 (*No.* 1068), *ss.* 8 (11), 28—*Arbitration clause—Application of arbitration clause to shareholder whose membership has ceased—"Any person claiming through or on account of a member"—Jurisdiction of Court.*

Held, that a rule of a building society that "if any dispute arise between the Society and any member of the Society or any other person claiming through or on account of a member and the Directors on any matter the same shall be referred to arbitration," did not apply to the holder of unpaid matured shares, whose "connection with the Society had," under its rules, "ceased and determined" upon the maturity of his shares.

Held, that a rule made with the object of interfering with the rights under the rules of a building society of a particular member of the society was *ultra vires.*

The principle of *In re Ambition Investment Building Society* ([1896] 1 Ch. 89) that before the winding up of a society there may be a point of time after which it would be inequitable to recognize attempts to change positions and gain priorities, and that the rules may, for certain purposes, be considered as ceasing to operate from that point, discussed.

The construction of the rules of a building society as to cessation of membership the priority of payments to shareholders, and deductions for losses from the amount payable on withdrawn and matured shares considered.

The decision of A'BECKETT, J. (*supra*, at p. 671 *et seq.*), as to the construction of the rules in part overruled.

APPEAL by the plaintiff from the decision of A'Beckett, J., reported *supra* at p. 671 *et seq.*, where the facts and the full text of rules 108 and 109 of the defendant society's rules are set out.

Rules 101 and 117 were as follows:—

Rule 101:—"Every person taking shares in this Society shall pay the sum of two shillings and sixpence per share as entrance fees, and shall be entitled to hold for his sole use and benefit three hundred investing shares

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or one hundred borrowed shares and no more; and the subscription or payment on each investing share shall be five shillings per month, payable monthly, quarterly, half-yearly, or yearly in advance, but subscriptions so paid in advance shall not mature shares for the purpose of withdrawal. Shareholders making payments in advance for a period of not less than six months shall be allowed such a rate of interest as the Board of Directors may from time to time allow. Such payments shall be made at the office of the Society, subject to the penalties hereinafter specified, until the subscriptions, interest, and profits as further provided for in these rules shall have accumulated to fifty pounds at the least for each share, when such share shall be satisfied out of the funds of the Society as provided for in rule 108, and the member's connection with the Society so far as such share is concerned shall cease and determine."

Rule 117:—"If any dispute arise between the Society and any member or members of the Society or between any officer or member of the Society or any other person claiming through or on account of a member and the Directors on any matter the same shall be referred to arbitration, in which case two arbitrators shall be named (who shall not be members of the Society), one by the member and the other by the Directors, to hear and determine the dispute, and such arbitrators shall before entering on the arbitration also appoint a third arbitrator to act with them in the matter. Upon such arbitration the said arbitrators or any two of them may call for the production of any books, documents, or evidence, and examine any party they may think fit, and the costs attending and consequent upon such reference and incidental thereto shall be borne and paid in such manner as the said arbitrators or any two of them may direct. The decision of the said arbitrators or any two of them shall be final."

It is not considered necessary to report the arguments as to the interpretation of the rules.

Isaacs, K.C., and *Weigall* (with them *Guest*) for the plaintiff, appellant—Where a member is given a preference by the rules of a society, he takes that preference with him into a liquidation of the society, and he cannot have it destroyed by a general administration or distribution: *Walton* v. *Edge* (*a*). The case of *Strund* v. *Permanent Mutual Benefit Building Society* (*b*) shows how the rules of a building society as between withdrawing and investing shareholders are to be worked out. A consideration of the rules shows that the plaintiff is no longer a member of the society; but even if he be a member, the rules cannot be altered to his individual detriment. In the case of the *Companies Acts* even the statutory power to make alterations is to be exercised subject to what may

(*a*) [1884] 10 App. Cas. 33. (*b*) [1897] 18 N.S.W. L.R. 194.

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be called equitable considerations: *Cf. Allen* v. *Gold Reefs of West Africa Limited* (c). The case of *Auld* v. *Glasgow Working Men's Building Society* (d) is directly applicable, a similar resolution to that proposed here being held *ultra vires*: See per Lord Halsbury, L.C., at p. 202.

Counsel also referred to *Pepe* v. *City and Suburban Permanent Building Society* (e) and *Thompson* v. *Atlas Permanent Building Society* (f).

Higgins, K.C., and *Davis* for the defendants, respondents—The plaintiff had no right to what he claimed after the society had ceased its normal working. Such privileges as are given by the rules are given only while the society is in full swing: *Cf. In re Ambition Investment Building Society* (g); *In re Co-operative Starr-Bowkett Permanent Land and Building Society* (h); *In re Counties Conservative Permanent Benefit Building Society* (i); *Sixth West Kent Mutual Building Society* v. *Hills* (k); and *Barnard* v. *Tomson* (l). The two first-mentioned cases show that the knowledge of the individual member as to whether the liquidation of the society is impending is immaterial; the question is one of knowledge and intention on the part of the society itself. In this case, when the notice of withdrawal was given or matured, it was generally recognized that the society could not carry on business; or, alternatively, the plaintiff in fact knew this. Any priority which otherwise the plaintiff might have had was thus lost: *Cf. In re Sunderland 32nd Universal Building Society: Rawlings* v. *Oliver* (m). *Pepe's Case* (n), cited by the other side, decides two things—(1) that by new rules you can interfere with the right of a person whose shares are matured; and (2) that a member remains a member until he is paid. That case has been recognized as an authority in *Botten* v. *City and Suburban Building Society* (o); and *cf. Allen's Case* (p) and *Sibun* v. *Pearce* (q).

(c) [1900] 1 Ch. 656, at pp. 671, 676.
(d) [1887] 12 App. Cas. 197.
(e) [1893] 2 Ch. 311.
(f) [1894] 97 L.T. Journal 218.
(g) [1896] 1 Ch. 89.
(h) [1896] 22 V.L.R. 47.
(i) [1900] 2 Ch. 819.
(k) [1899] 2 Ch. 60, and note at p. 64.
(l) [1894] 1 Ch. 374.
(m) [1890] 24 Q.B.D. 394, at p. 403.
(n) [1893] 2 Ch. 311.
(o) [1895] 2 Ch. 441.
(p) [1900] 1 Ch. 656, at p. 673.
(q) [1890] 44 Ch. D. 354.

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The plaintiff has always acted and been treated as a member of the society, and has always exercised the rights of a member by voting as such. The plaintiff is therefore bound by the new rules.

[MADDEN, C.J., referred to *Baily* v. *British Equitable Assurance Company* (r).]

That case has no application here. There the Court merely held that the society had no right to interfere with the rights of persons who were not members of the society.

[MADDEN, C.J. I cite that case on the assumption that the plaintiff has ceased to be a member of the society and is therefore merely an outsider.]

Still the plaintiff's rights are such as spring out of his original contract with the society. If he is a "quasi-member"—as members in his position have been called—he has his rights under his contract with the society; and he cannot dissever himself from his relations with the society under such contract. *Cf.*, on these questions of alterations of rules and reduction of shares, *Baily's Case* (s); *Punt* v. *Symons and Co. Limited* (t); *In re Welsbach Incandescent Gas Light Company Limited* (u); *Underwood* v. *London Music Hall Limited* (v); *Strohmenger* v. *Finsbury Permanent Investment Building Society* (w); *Andrews* v. *Gas Meter Company* (x); *Laing* v. *Reed* (y); and *Hardcastle on Statutory Law* (3rd ed.), p. 7. In *Hill's Case* (z), Byrne, J., says that "in view of the decisions in *Strohmenger's Case* (a) and *Pepe's Case* (b) it is impossible to contend successfully that the right of a member of a building society like the present may not be varied by a new rule made under and in accordance with its statutory power of altering rules; and the rules may be varied so as to affect the rights of a member even after he has given notice of withdrawal." Further, the plaintiff as a co-adventurer or *quasi*-partner is liable for his share of the losses, and must bear the deduction of losses provided for in the rules: *Cf. Bradbury* v. *Wild* (c).

(r) [1904] 1 Ch. 374, at p. 385.
(s) [1904] 1 Ch. 374, at p. 384.
(t) [1903] 2 Ch. 506.
(u) [1904] 1 Ch. 87.
(v) [1901] 2 Ch. 309, 313.
(w) [1897] 2 Ch. 469, at p. 477.
(x) [1897] 1 Ch. 361.
(y) [1869] L.R. 5 Ch. 4, at pp. 9, 10.
(z) [1899] 2 Ch. 60, at p. 68.
(a) [1897] 2 Ch. 469.
(b) [1893] 2 Ch. 311.
(c) [1892] 1 Ch. 377.

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He cannot assume a common law attitude as mere creditor. Again, the plaintiff has no right which he can assert until he has tried arbitration under rule 117. He is subject to the arbitration rules, because disputes might arise *after* the maturity of shares—*e.g.*, as to deduction for losses. Where the rules of a building society provide for arbitration the Court has no jurisdiction to hear a dispute between the society and one of its members: See *Municipal Building Society* v. *Kent* (*d*); *Hack* v. *London Provident Building Society* (*e*); *Johnson* v. *Altringham, etc., Society* (*f*); *Melbourne Permanent Building Society* v. *Taylor* (*g*); and *Figgis* v. *Monsbourgh* (*h*). The cases show clearly that, even though a member has given notice of withdrawal, he remains a member of the society, so that any dispute between him and the society must be referred to arbitration: *Mackenzie* v. *The Everton and West Derby Permanent Building Society* (*i*); *Walker* v. *General Mutual Building Society* (*k*).

Counsel also referred to *Wurtzburg on Building Societies* (4th ed.), pp. 182, 254, and the cases there cited.

Isaacs, K.C., in reply—On the question as to whether the plaintiff has ceased to be a member, see *Sibun* v. *Pearce* (*l*).

[HOOD, J., referred to *Christie* v. *Northern Counties Permanent Benefit Building Society* (*m*).]

If the plaintiff has ceased to be a member there is nothing in the rules which says he must go to arbitration. *Primâ facie* there is jurisdiction in this Court, and it requires express words to take it away. In any case the defendants should have asked for a stay of the action on the ground that there was no jurisdiction—that is, if they are relying merely on the rules, apart from the Act of Parliament. There is no case which says that a person who has ceased to be a member is to be considered for any purposes a member; he is outside the rules altogether. *Wurtzburg on Building Societies* (4th ed.), p. 253, says:—"The following are amongst the cases which must be tried by the Court:—The question

(*d*) [1884] 9 App. Cas. 260, at pp. 277, 278.
(*e*) [1883] 23 Ch. D. 103.
(*f*) [1884] 49 L.T. (N.S.) 568.
(*g*) [1896] 21 V.L.R. 716.
(*h*) [1896] 21 V.L.R. 721.
(*i*) [1890] 61 L.T. 680, at p. 683.
(*k*) [1887] 36 Ch. D. 777.
(*l*) 44 C.D. 354, at p. 371.
(*m*) [1899] 43 Ch. D. 62.

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or dispute whether a man is a member of the society or not." The principle of *In re Ambition Investment Building Society* (*n*) has no application here.

[PER CURIAM. We have no trouble about that.]

Counsel also referred to *The New River Company* v. *Mather* (*o*) and *Heyward* v. *East London Waterworks Company* (*p*).

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HODGES and HOOD, JJ.] We think that the time which has been spent in this case relieves us from deferring consideration of this matter further. Most of that which comes before us for our consideration depends upon the true interpretation of these rules, and it certainly is nothing more than a well-deserved compliment to the kindred of draftsmen to say that such rules have never been seen before. A great many authorities have been cited in the course of the argument, and in a great degree those cases depend upon the particular features of the rules then in the contemplation of the Court. We have to interpret these rules as best we can, and it is quite certain that logically there is no satisfactory conclusion to be drawn from the reading of them at all. All we can do is to make the best reading of them which we find possible.

We think it is quite clear, agreeing with our brother A'Beckett, that these rules do undoubtedly give a priority to that class of shareholders which has been spoken of as holders of matured shares as contradistinguished from those who are called withdrawn members. Those expressions in themselves are not quite accurate, but they have served for the purpose of the argument, and they will serve for the purpose of the judgment to-day. His Honor was quite satisfied that whatever else the rules did they did establish a priority of the first of those classes as against the second.

In order to get rid of it one has to observe that nobody under these rules was allowed to retire from the society until after twelve months of membership had been attained, except in the case of those who had died, and whose representatives were allowed to withdraw from the society even if the deaths occurred within the

(*n*) [1896] 1 Ch. 89. (*o*) [1875] L.R. 10 C.P. 442, at p. 454.
(*p*) [1884] 28 Ch. D. 138.

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twelve months, and except also in the case of persons who had become lunatic within the twelve months. There seems to be an express exception made in favour of those persons that, whenever they had died or become lunatic, whether before or after twelve months of membership, they were placed in a special class by themselves, and therefore were always excepted from the rules. Having said so much, we may wipe out of consideration those classes of persons.

What we come to next is this:—What was the actual position of persons who held shares which had matured as distinguished from persons who withdrew their shares according to rule 108? One has to look for this purpose to rule 101 first. That provides for the manner in which a person may take up shares, for the number of shares he may take up, for the amount of the subscription, and for the periods of proportionate payments. It provides that he may pay money in advance if he likes, but that that advance payment shall not operate to mature his shares untimely. It then provides that people making payments in advance may, as the directors see fit, have interest in respect of those advance payments. It then provides that "Such payments shall be made at the office of the society, subject to the penalties hereinafter specified, until the subscriptions, interest, and profits as further provided for in these rules shall have accumulated to fifty pounds at the least for each share, when such share shall be satisfied out of the funds of the society as provided for in rule 108, and the member's connection with the society as far as such share is concerned shall cease and determine." Now, but for the proviso as to rule 108, that would be a fairly clear rule. It is not elegant and not very specific, but still it is intelligible enough, and it would seem to clearly show that when a subscriber reached 50*l.*, two things would happen—firstly, his connection with the society would stop; and secondly, he would be entitled to be paid. Then, when one looks at rule 109, it bears out that view in a very plain way. In the first place it says—"Next after payment of withdrawn shares to the legal representatives of deceased or lunatic members" (the classes which I have already mentioned as excepted from the rules) "the persons holding unadvanced shares paid up for the prescribed term shall have the preference, and shall be paid out in full and in rotation

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according to their respective subscriptions being fully discharged, subject however to the aforesaid deduction for excess of expenses, or losses if any, and the interest payable annually, half-yearly, or quarterly at a rate to be fixed by the Board of Directors shall be allowed to such members holding paid-up shares on the amounts respectively due to them, such interest to commence from the date of the realization of their shares respectively." The word "realization" there means the consummation of the share—its ultimatum, its final prosperity and success. Therefore one finds, reading that rule next after rule 101, that it contains the words that the share which is to be paid in full is to be "subject however to the aforesaid deduction for excess of expenses, or losses." All that therefore shows that rule 108, in the natural order of things as well as arithmetically, ought to precede rule 109. Of course, there was an original rule 108, which was struck out, and the present rule was substituted for it. Rule 108 provides that members who have not received advances, and who may be desirous to withdraw, may if they think fit withdraw and take their money with interest, but leaving any bonuses behind them. These are spoken of as "withdrawals." The rule goes on—"Such withdrawals shall be regulated as follows:—No withdrawals shall be permitted unless in the case of death or insanity of the member under twelve months from the date of each member's admission respectively, provided always that payment of any debts due from the society shall if required by the Board of Directors be made before any share shall be withdrawn therefrom. The sum paid for withdrawals shall in no case exceed half the income derived from the investing shares, and withdrawn shares (not wholly subscribed for) shall be paid out according to the priority of the applicants. In case the expenses of the Society and any loss sustained by it exceed the profit, all withdrawn shares shall be chargeable with a due proportion of such excess, and this rule shall equally apply to members cancelling their unadvanced shares previously to their taking a loan from the society, all subscriptions ceasing from the expiration of such notice, and the society shall be liable to pay interest on the amount at the rate of 8 per cent. per annum until paid."

Now, in that rule the only deduction that is mentioned is the deduction that takes place in the last clause of it. Put that in its

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place before rule 109, and then look back to see what is the "aforesaid deduction for excess of expenses, or losses," which is referred to in rule 109. One sees that it is the deduction mentioned in the last clause of rule 108. Therefore, if one were without more question about it to read these three rules in that way, they all hang together in a reasonable fashion—not altogether satisfactory in view of the accurate mind of a draftsman, but sufficient to see that if that meaning is taken and the rules are read one with the other, without all that precedes that last clause of rule 108, that clause applies to all shares withdrawn from the society. They are to bear their proportion of the excess of losses over profits. It relates to the new class of shares as contradistinguished from the class of matured shares called withdrawn shares, and which may be so called having regard to the earlier part of rule 108.

Therefore, rule 108 creates a new class of shares, and then calls that new class which it creates "withdrawn shares." The word "withdrawn" would not unnaturally apply to shares included in withdrawals; but, however, the shares are taken from the society. That is to say, it would refer to both matured and withdrawn shares. Nevertheless, the shares are withdrawn. Although the language is inapt and embarrassing, nevertheless it would cover both classes of shares.

In this relation the difficulty arises thus:—According to the judgment of our brother A'Beckett, he notices that rule 101 contains that expression—"Such shares shall be satisfied out of the funds of the Society as provided for in rule 108." He then looks to rule 108, and sees that provision that "the sums paid for withdrawals shall in no case exceed half the income derived from the investing shares." He says, therefore, that that must apply to the case of matured shares. His Honor goes on to say that anyone acquainted with the business of building societies would know that such a thing could never be done—that it is impossible that the two classes of shares could ever be paid out of the one-half of the income. He emphasizes that fact, but he goes on to say that there is a provision in rule 101 that the money is to be paid as provided in rule 108, "and therefore, nonsense though it appears to be, I must give practical effect to it, and the only way is to say that it must be interpreted in such a way as that payment of both

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classes of shares is to be made out of one-half of the income, as provided in rule 108."

But we think that His Honor has fallen into error in applying the whole of rule 108 to rule 101, and that as a matter of fact all that needed to be done was to apply the last clause of rule 108 to satisfy the proviso of rule 101. Rule 101 does not say that every part of rule 108 shall apply to rule 101, but only that the payment in full which is to satisfy the matured shares out of the funds of the society shall be as provided in rule 108. That merely means the payment is to be satisfied in full, but subject to having deductions made in respect of the excess of losses over profits. We therefore agree with His Honor that there are two classes of shares, and that matured shares have a priority over withdrawn shares; but we think that matured shares have to be paid in full, in rotation where there are more than one, out of the funds of the society, and that the only limitation is that each share shall bear its proportion of the excess of losses over profits. That is the interpretation we give to the rules. That interpretation makes the rules run as smoothly as the ordinary canons of interpretation will allow. We are bound to interpret every part of them, and keep every part of them alive as far as possible, and we think that that interpretation gives effect to the ordinary rules of interpretation.

The next question is this:—Does a person whose shares have matured—have reached 50*l.*—continue or cease to be a member? In our opinion he ceases to be a member, because rule 101 makes provision that the payments are to be made until the subscriptions, etc., shall have accumulated to 50*l.*, "when such shares shall be satisfied out of the funds of the Society, as provided for in rule 108, and the member's connection with the Society, so far as such share is concerned, shall cease and determine." We think that must aim at this—"Now, your share has ripened, and it is proper that you should withdraw." One of the foundations of these societies is that when a share shall have come to maturity the holder of it shall withdraw and not be lingering on and taking interest for that share. What is wanted is a series of new shares constantly coming on in succession, which will run for a long period of contribution, and which will not be constantly making demands on the society for redemption. Therefore, when 50*l.* is reached it

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ought to be paid off. We think those two phrases, "such share shall be satisfied," and "the member's connection with the Society . . . . shall cease and determine," run together. What is meant is this—"The 50*l*. has matured, now out you go. You will be paid in full; if more than one of you, then in rotation. We get rid of you, and you sever your connection so far as the matured shares are concerned." That is the purpose of the society. We think that view is more probable, because it is quite clear that once a share has matured it cannot any longer share in profits such as any other share in process of maturing will get. All that it can get is such interest as the directors choose to fix. The rule is that if the money remains in the shareholder cannot have the same advantage as another member, and he cannot have the same advantage he would have from lending out a certain sum of money in hand to another institution.

I am reminded by my brother Hood in this connection that rule 109 uses the word "member" in respect of a person whose share has matured, in this way:—After providing that persons holding shares fully paid up are to be paid in full, subject to the aforesaid deduction, the rule provides that "the interest . . . . shall be allowed to such *members* holding paid-up shares on the amounts respectively due to them." We think that that word "member" is not used for the purpose of making that man a member who was not such by the previous rules, and had severed his connection with the society. We think it is used for lack of a better word. The draftsman had not a very fruitful mind, and apparently the word clung around him, and he used it for lack of a better, not for the purpose of annulling the previous provisions made by rule 101.

Now comes the next question. It is said in this particular case that the rule of law re-stated in *In re Ambition Investment Building Society* (*q*), which has been referred to, applies here. That case examined a series of cases which preceded it, and placed them on an intelligible basis by correlation and analysis. That particular case was one in which the society had come into liquidation, and a certain person claimed that, before it had come into liquidation, she had given notice of withdrawal of her shares.

(*q*) [1896] 1 Ch. 89.

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She would belong to the second class of persons I have referred to. It was said—"You cannot do this—the society is in liquidation; and then the question arises—there must be a time when a man exercising his right under the rules may withdraw, but there must be a time when that right stops." The Court was of opinion that, where a society goes into liquidation, there must be a time at which it is plain a stampede of the shareholders cannot be permitted, otherwise a great injustice would be done. They say that that time is when the society's business stops, or when the management makes it plain that the business must stop. That was the decision. But the language of the Court in delivering its judgment seemed to go further than the particular case required, and to indicate that, whether the society goes into liquidation or not as a fact, still, after it does stop its normal, natural, and regular business, or makes it plain that it intends to or must stop, then the rules become practically paralyzed; that the rules are given to the management to conduct the affairs of the society on certain specific lines. If it cannot conduct them on those lines then it is not to conduct them at all. The rules no longer operate. It is said this case comes within that principle, that the society had in fact stopped, and that it is plain that it could not do anything else. We are of opinion that that is not so. It is quite clear that with other financial institutions it suffered severely, that there was danger on every hand, and that something had to be done. This particular society took in sail. It did not stop. It never gave any indication of its intention to stop, but it has carried on business from that day to this. But it resolved to go slowly and cautiously in the business before it. We think, therefore, it is impossible to say that it stopped, because it had not stopped, nor was there any reason to believe that it would stop. The answer is that it did not stop, and has not stopped now. It carried on business, not in the same prosperous way, but as best it could, and with some degree of success. It is a question of fact, and in this particular case the facts show that it is not within the rule.

Then comes the other question that remains in respect of these shares. I had better conclude the answer which is set up to the plaintiff's claim altogether. It is said that the plaintiff has taken the wrong procedure—that he ought to have proceeded by arbitra-

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tion under rule 117. That rule is adopted in pursuance of secs. 8 and 28 of the *Building Societies Act* 1890, which give authority to a society to make such rules as they are minded to adopt. They adopted this rule:—"If any dispute arise between the Society and any member or members of the Society, or between any officer or member of the Society, or any other person claiming through or on account of a member, and the *Directors* on any matter the same shall be referred to arbitration, etc." In this case we have already found that the plaintiff had ceased to be a member at the time when this question arose. He had matured his share, which belonged to the matured class, and the result of the other rules was that he ceased to be a member. Therefore this particular rule does not apply to him at all. It only applies to members.

A number of cases were cited to show that in England in certain societies, either where a person had been a member and continued to be a member, or where a man had attained a right in respect of his membership and then had ceased to be a member, he might be said to be "a person claiming through or on account of a member," because although he was himself alone at that time, he had been a member and rights were appertaining to him by reason of his membership, and therefore, though not legally a member, he was a person claiming through or on account of a member. But in those cases the language of the rule was that a member or anyone claiming through or on account of a member who had a dispute with the society would still be a member and subject to arbitration. But here the language is "any other person claiming through or on account of a member and the *Directors*." We think this case is not that, and therefore those authorities do not affect the position here. Therefore, as we hold that the plaintiff was no longer a member, he was not bound to go to arbitration. In that respect we agree with our brother A'Beckett.

I may now say appropriately that we think, on the interpretation we have attached to the rules, that the owner of a matured share is a person who in respect of that share is liable to bear a deduction in respect of the excess of losses over profits. We think it is clear that, under the last clause of rule 108, as well as the clause in rule 109, matured shares, in common with all other shares withdrawn from the society, must be subject to that deduction.

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Then comes the question how that member is to be dealt with in this case. It is quite clear that if he had been settled with at the date of the maturity of his shares he would have had to bear that deduction, and it would have had to be ascertained then. It is said that one of the rules which relates to that deduction provides that in arriving at the position of the society as to what may be its profits, "the remaining portion of the profits (after providing for all losses and anticipated losses) shall be equitably proportioned at an equal rate per cent, on the balance to credit (consisting of subscriptions and interest only) of investing shares at the close of the preceding financial year": See rule 107. It is sufficient to say that in that rule there is a deduction to be made of "losses and anticipated losses." In rule 108 it is provided that that which is to be deducted shall be "any loss sustained." It is therefore argued before us that, as rule 107 provides that, for the purpose of calculation of the society's balance-sheet profits, they must deduct losses and anticipated losses, and as in the very next rule anticipated losses are not spoken of, but only sustained losses are provided for, that which is to be deducted from matured shares must be losses which had been sustained, after deducting from them profits that had been ascertained. On the reading of these rules that argument is undoubtedly impressive, and it we had to interpret the rules with rigidity it certainly would be a difficult matter to get over that argument. But it appears to us that the result would be so unjust that we ought to consider that the real intention of these rules is to provide that everybody in his day, and in relation to his shares, shall have to bear the particular losses appertaining to them. It is quite clear, having regard to the time at which the shares matured, that there must have been losses. Our brother A'Beckett, who is the judge of the facts, and with whose judgment we ought to be very careful not to interfere, has found that there were undoubtedly losses. The evidence on which he acted is that of Mr. Buchan, the manager of the society, who said that, calculating as best they could, the losses which unquestionably existed, and which may be better or may be worse, were such that the shares were depreciated by 7*s.* 6*d.* in the pound, and he says that if they had to calculate them as to 1893–4 they would certainly be worse. At present the depreciation is 7*s.* 6*d.*

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in the pound; then it was worse. His Honor has believed that evidence, and we are not in a position to say that he was wrong in that. If we were to form an opinion about it, whatever the position was in 1893 everybody knows as a matter of notoriety that it is better now. We therefore think, as His Honor has said, that there is a loss of 7*s.* 6*d.* in the pound. It was his right to so decide, and we also think it is a reasonable position to take up now. It is certainly the right of the plaintiff to say that he prefers to take a new trial of the action, or to say that he desires the action to be sent to the Chief Clerk to determine as to whether 7*s.* 6*d.* in the pound is too much for this deduction. But it appears to us, looking at the matter *à priori*, if the plaintiff went into it he would come out worse than by taking 7*s.* 6*d.* in the pound. Therefore we think if that position is accepted by the plaintiff, that he should take his 3000*l.*, *i.e.*, his 4800*l.* discounted by 7*s.* 6*d.* in the pound.

There is also a claim that the directors should now be required to fix the interest upon the plaintiff's matured shares. But if that were done the result would be that to provide for it would involve a further discounting of his shares in order to give effect to it, and to provide the interest which might have accrued. If the society is not in a position to pay 20*s.* in the pound, much less is it in a position to pay interest which might have accrued. We cannot, therefore, see that we ought to make any order in respect of interest.

The only remaining thing to be referred to is the proposed new rules. The objection is taken that the new rules are bad in all particulars; that it was an attempt to make new rules against the plaintiff after he had ceased to be a member, treating him as a member. Objection was taken that that cannot be done. We think that it cannot. We have held that the plaintiff is not a member within the rules. The rights he had cannot be taken away from him by the society, of which he is no longer a member. That is a common principle, apart from the authorities placed before us. But we think, in addition to that, that if he had been a member the attempt to impose these rules upon him was not *bonâ fide*, and not permissible under the power to alter the rules. It is quite clear on the evidence before us that this alteration of

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the rules was aimed fairly and squarely against the plaintiff. He was a trouble. The society was creeping on fairly satisfactorily, and if his money had to be provided for and withdrawn they felt it would be a very heavy blow to their efforts. It is quite clear they thought that his preference should be taken away from him and other rights substituted, and that without consulting him at all. That would be clearly wrong and against the first principles of justice, quite apart from law.

Therefore we think an injunction should be granted against the registration of these rules. We think the appeal must be allowed with costs, with an intimation of our opinion that the plaintiff should take 3,000*l.*, with costs to be taxed, and an injunction. But if the plaintiff prefers to have an inquiry before the Chief Clerk, or a new trial, he may have which he chooses.

Appeal allowed.

Solicitors for the appellant: *Smith & Emmerton.*
Solicitor for the respondent: *Jennings.*

H. I. C.

A'BECKETT, J.
1904
June 30, July 25.

In the Will of SMITH; SMITH *v.* SMITH.

Will—Gift to widow for the benefit of herself and children—Trust—Precatory trust.

A. (1905) V.L.R. 470.

A testator devised and bequeathed all his real and personal estate unto his wife to hold the same unto her for her life for the benefit of herself and their children and at her death to be divided equally among such of their children as should then be living.

Held, that the widow held the property in trust for herself and the children, and that during her lifetime the widow and children were equally and jointly entitled to the income thereof.

Huggard v. *Huggard* ([1901] 7 A.L.R. 139) distinguished.

ACTION.

The last will of Albert Sigismond Cyrnes Smith contained the following:—"I give devise and bequeath all my real and personal estate whatsoever and wheresoever unto my dear wife Emily Victoria Elford Smith to hold the same unto her for and during the period of her natural life for the benefit of herself and our

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children and at her death to be divided amongst such of our children as shall be then living share and share alike. And I appoint the said Emily Victoria Elford Smith and my son Albert Edward Smith executrix and executor of this my will."

The testator was a storekeeper and hotelkeeper, and also a farmer, and died on 12th November 1885. Probate of his will was granted to the executors named therein.

This was an administration action by three of the children against the executors, claiming administration accounts and inquiries and certain declarations. On the action coming on for trial the parties agreed that certain questions arising on the construction of the will should be determined before dealing with any other matter raised on the pleadings. These are the only questions dealt with in this report.

Higgins, K.C. (with him *Mann*), for the plaintiff—The effect of the will is to make the widow a trustee for herself and her children during her life: *Jubber* v. *Jubber* (*a*); *Armstrong* v. *Armstrong* (*b*); *Newill* v. *Newill* (*c*); *Barnes* v. *Grant* (*d*); *Jarman on Wills* (5th ed.), p. 370. It is true that the current of modern decisions is against allowing a precatory trust to be raised unless the language points clearly to a trust. But the cases to which the Court applies this principle are cases where there is some discretion in the alleged trustee, and where the words used are precatory: *Vide Lambe* v. *Eames* (*e*), where the gift was to testator's widow to be "at her disposal in any way she might think best for the benefit of herself and family." He referred also to *Crockett* v. *Crockett* (*f*); *In re Hutchinson and Tenant* (*g*); *Re Adams and Kensington Vestry* (*h*); *Scott* v. *Key* (*i*); *Lewin on Trusts* (10th ed.), 148; *Re Oldfield* (*k*).

Mitchell, K.C., and *Goldsmith* for the defendant A. E. Smith—The gift to the widow is an absolute gift to her for life. The addition to this of words purporting to give her a discretion will not cut down the absolute nature of the gift. There is no gift of

(*a*) [1839] 9 Sim. 503.
(*b*) [1869] L.R. 7 Eq. 518.
(*c*) [1872] L.R. 7 Ch. 253.
(*d*) [1856] 26 L.J. Ch. 92.
(*e*) [1871] L.R. 6 Ch. 597.
(*f*) [1847] 2 Phil. 553.
(*g*) [1878] 8 Ch. D. 540.
(*h*) [1883] 24 Ch. D. 199.
(*i*) [1865] 35 Beau. 291.
(*k*) [1904] 1 Ch. 553.

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income to children with the mother. The executors can get a sufficient discharge from the widow. The Court leans against the extension of precatory trusts: *In re Diggles* (*l*). There is no power of sale, and it can hardly have been testator's intention that the widow should carry on the business subject to accounting to the children. The case is very like *Huggard* v. *Huggard* (*m*). If there is a trust the widow's is the hand to distribute.

They referred also to *Bond* v. *Dickinson* (*n*); *Re Robertson's Trust* (*o*); *Trench* v. *Hamilton* (*p*); *Lewin* (10th ed.), p. 149; *Re Isaac Lazarus* (*q*); *Robinson* v. *Tickell* (*r*); *Thorp* v. *Owen* (*s*); *Mussoorie Bank* v. *Raynor* (*t*); *Re Hanbury* (*u*); *Re Williams* (*v*); *Crozier* v. *Crozier* (*w*).

Hayes for defendant E. V. E. Smith referred to *Theobald* (5th ed.), pp. 252, 355, 433; *Hill* v. *Hill* (*x*).

Higgins, K.C., in reply, referred to *Lewin on Trusts*, p. 1069. Assuming testator intended business to be carried on there would be no great inconvenience. Accounts could have been kept. But there is no duty to carry it on. The duty is to convert unless there is an express indication to the contrary: *Howe* v. *Earl of Dartmouth* (*y*); *MacDonald* v. *Irvine* (*z*).

Cur. adv. vult.

A'BECKETT, J., read the following judgment:—In this case the testator, a country hotel and store keeper, made his will, as far as material, in the following words. (His Honor read the will.) The will was proved by both in 1885. The testator left nine children, one of whom has since died. In June 1903 an action was begun by three of these children against the mother and brother executor, asserting rights in respect of income misapplied, and of capital alleged to have disappeared, and claiming to follow trust funds

(*l*) 39 Ch. D. 253, at 257.
(*m*) 7 A.L.R. 139.
(*n*) [1875] 33 L.T. (N.S.) 221.
(*o*) [1858] 6 W.R. 405.
(*p*) [1895] 2 Ch. 370.
(*q*) [1898] 24 V.L.R. 567.
(*r*) [1803] 8 Vesey 142.
(*s*) [1843] 2 Hare 607.
(*t*) [1882] 7 App. Cas. 321.
(*u*) [1904] 1 Ch. 415.
(*v*) [1897] 2 Ch. 12.
(*w*) [1873] 15 Eq. 282.
(*x*) [1897] 1 Q.B. 483, at 488.
(*y*) [1802] 7 Ves. 137, at p. 150.
(*z*) [1876] 8 Ch. D. 101.

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into lands which the brother bought after the father's death and claimed to hold in his own right. One of the defences is that no trust was imposed by the will upon the mother as to the income during her life; that she had a right to do what she chose with it, and therefore that the plaintiffs have no right to call upon the defendants to account for it. It has been contended for them that the words, "for the benefit of herself and her children," are merely indicative of the motive for giving a life estate to the widow, and impose no obligation on her. *Jarman on Wills* deals with questions such as the present by saying:—"Where the motive or purpose of the gift is the benefit of other persons as well as the primary donee three constructions obtain, according to the language used. The purpose may be so peremptorily expressed as to constitute a perfect trust, or may be such as to leave entirely in the discretion of the primary donee the quantum of benefit to be communicated to the other persons provided that such discretion is honestly exercised, or lastly the expression of motive or purpose may be merely nugatory and not operate to abridge the previous absolute gift to the primary donee." The plaintiffs put the gift here in the first class, the defendants in the last. I hold that it is in the first. The authorities, as Jarman observes, draw very minute distinctions, and cannot all be reconciled with one another, but I have found no English authority which comes near the present in support of the defendant's view. Where a gift is made to A. for the benefit of A., B., and C., it seems to me an unwarrantable assumption that the reference to A., B., and C. is merely an indication of motive, and that B. and C. have no rights whatever. The fact that A. is mother and B. and C. are children should not alter the construction which would be put upon the gift in the case of strangers. While there is no authority which gives any clear support to the defendant's view, there are authorities which support the plaintiffs', of which *Jubber* v. *Jubber* (*a*) is one. There the bequest was to the testator's wife for the benefit of herself "and her unmarried children that they may be comfortably provided for so long as my wife may remain in this life." The widow and unmarried daughters were held to be entitled, in equal shares, to the income during the widow's life. There was much more to suggest mere motive in

(*a*) 9 Simons 593.

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that case than in this. I do not, however, base my view upon *Jubber* v. *Jubber*. I rely upon the force of the words of the gift in themselves, and think that a gift to a wife for the benefit of herself and her children *simpliciter*, is equivalent to a gift to a wife in trust for herself and her children, which would, of course, admit of no doubt. I should notice a decision of the learned Chief Justice relied upon by the defendants. In *Huggard* v. *Huggard* (b) the gift was by husband to wife, in trust "for the benefit of herself and our children during her life and after her death the whole of my real estate I give to my son and in the event of my wife dying without a will disposing of my personal estate I bequeath the same to be equally divided between my children." The question was whether the widow and children were joint tenants of the income. The widow asserted that she alone had the right to dispose of the income. Great stress was laid in argument and in the judgment upon the widow's power of disposition by will, and the judgment, though on certain points favourable to the widow, declared that she held the property "subject to the obligation of applying such property and the income thereof for the benefit of herself and of all the children of the testator who reside with her and in her discretion of such children as shall have ceased to reside." This in no way supports the present defendant's contention that the widow here takes subject to no obligation whatever. *Huggard* v. *Huggard* recognized a trust of a special kind, one of the second class mentioned in *Jarman*, where there is a legal duty, but in which the mode of performance is not scrutinized by the Court if the duty has in fact been performed. The defendants here contend that there is no duty, and *Huggard* v. *Huggard* is clearly distinguishable from the present case. The parties to the action wisely consented that, before dealing with any other matters raised by the pleadings, the question of construction which I have dealt with should be disposed of, and that any party desiring to appeal should appeal from this judgment, and not wait until a later stage of the action. In view of the fact that the widow has been acting for many years upon the view that she could do as she chose with the income, without any regard to equality of distribution, I may express the hope that, if my decision stands,

(b) 7 A.L.R. 139.

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the parties will come to some adjustment amongst themselves to equalize their rights with regard to past income. The adjustment of their rights before the Chief Clerk by an ascertainment of sums received, sums expended, benefits enjoyed and services rendered since the year 1885, as between the widow and nine children, would be a very lengthy, difficult, and costly process.

I propose now to give judgment according to the following minutes:—

The parties having consented to the question raised by the pleadings as to the true construction of the will being determined before dealing with any other matter raised by the pleadings, declare that, according to the true construction of the will with regard to the income of the estate during the lifetime of the widow, the widow and children were equally and jointly entitled to such income. Reserve all costs of this hearing for future consideration. Any of the parties to be at liberty to set the cause down for further hearing after the time limited for appeal from this judgment shall have expired, in the event of there being no appeal, on notice to the other parties stating generally the course proposed to be taken, so that it may be known whether the attendance of witnesses will be required. Liberty to any of the parties to apply if so advised after the service of such notice.

Solicitor for the plaintiffs: *Woolf*.

Solicitors for defendants: *Hughes & Permezel* (for *Mitchell, Nevitt & Robinson*, Ballarat).

J. M.

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HOOD, J.

1904
August 24.

HAYNES *v.* WILLIAMS.

Justices Act 1890 (*No.* 1105), *s.* 85—*Withdrawal of case by complainant—Payment of costs, condition precedent—"Order," meaning of.*

A complainant in proceedings before justices has the same right to discontinue or withdraw his case as a litigant in other Courts, but the payment of costs is a condition precedent to such right under sec. 85 of the *Justices Act* 1890. Meaning of "order" discussed.

ORDER TO REVIEW.

The complainant Haynes sued the defendant Williams in the Court of Petty Sessions at Prahran to recover 50*l.*, being the commission due on the sale of a business. Upon the close of the complainant's case, the solicitor for the defendant contended that there was no evidence of instructions to sell and no evidence of a sale. The justices, after having retired, announced that they found no evidence of any instructions to sell, and said that the case would be dismissed, with 2*l.* 2*s.* costs. The complainant's solicitor then offered to withdraw the case, and asked to be allowed to do so, and the justices allowed him so to do and fixed the costs at 2*l.* 2*s.*. The defendant's solicitor then objected that immediate payment of costs was a condition precedent to the right to withdraw, and said he would not accept the undertaking to pay offered by the complainant's solicitor. The justices, without further comment, called on the next case. The costs had not been paid up to the time when the order to review was granted. The order to review was granted upon the following grounds:—(1.) That the justices had no jurisdiction to allow the complainant to withdraw under sec. 85 of the *Justices Act* 1890, except upon the immediate payment of the costs fixed as a condition precedent to such withdrawal. (2.) That the justices should have dismissed the complaint. (3.) That the justices exceeded their jurisdiction in allowing the complainant to withdraw.

Cussen for the defendant to move the order absolute.

Bryant for the complainant to show cause.

HOOD, J. In my opinion sec. 85 of the *Justices Act* confers the right upon the complainant in a civil case or for the recovery

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of damages for assault, or in the case of a set-off, upon the defendant to discontinue his complaint or set-off before the same is determined, and gives to the complainant or defendant, as the case may be, the same right to discontinue as a litigant would have in other Courts. I am satisfied that the Legislature has made the payment of costs a condition precedent to any right to withdraw the case, and the proper course to adopt when a party desires to take advantage of the section is for the justices to fix the costs payable, and if the person liable to pay them pays them at once the case may be withdrawn. If there is a hitch as to the payment the justices should adjourn and not allow the case to be withdrawn until those costs have been paid. I think the justices were wrong, after intimating their decision and determining the case, in allowing the complainant to withdraw, and were also wrong in not compelling him to pay the costs first. They either should not have allowed him to withdraw, or if they did they should have made the payment of costs a condition precedent.

I feel some doubt whether I have jurisdiction in this case because in the view I take of the section the justices had nothing to do except to fix the costs. The right to withdraw is a right the party has upon payment of the fixed costs. However, the definition of "order" is so extensive that I think, though with some doubt, that the justices did refuse to determine the case in the way they should have determined it. What they did was to refuse to enter up the proper determination. They made a determination that the case should be dismissed, and they should have entered that up. The order will be made absolute with costs, and the decision really arrived at will now be entered—that is, the case will be dismissed, with costs, 2*l*. 2*s*.

Order absolute.

Solicitors for complainant: *Croft & Rhoden.*
Solicitor for defendant: *G. L. Skinner.*

W. H. M.

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HOOD, J.

1904
August 17, 26.

[PRACTICE COURT.]

THE GREAT CENTRAL FREEHOLD MINES LTD. *and Others* v. CHAPMAN *and Others.*

Practice—Supreme Court Act 1890 (*No.* 1142), *s.* 232—*Appeal to Privy Council—Security, lodging same within time fixed—Registration of mortgage.*

An order giving the defendants leave to appeal to the Privy Council directed that the defendants should give security to the satisfaction of the Prothonotary within three months, and it was ultimately agreed that a registered mortgage would be sufficient.

The defendants lodged a mortgage, executed in duplicate, at the Titles Office within the specified time, but did not offer a registered mortgage to the plaintiffs or to the Prothonotary until after such time. Upon the face of the mortgage it appeared to have been registered within the required time. Upon a motion to have it declared that the defendants had lost the benefit of the order giving them leave to appeal on the ground of non-compliance with the terms of the order, it was sought by the plaintiffs to show that although the mortgage was lodged within the time it had not been registered until several days after such time had elapsed.

Held, that the indorsement on the duplicate mortgage made under sec. 61 of the *Transfer of Land Act* 1890 was conclusive evidence that the instrument had been duly registered, and that due registration included the time of registration.

Held also, that delivery to the Registrar of Titles for registration of such mortgage enabled that official to hold the same on behalf of the plaintiffs, and was a sufficient delivery.

THIS was a motion on behalf of the plaintiffs for an order that the defendants in the action had waived the benefit of an order obtained by them giving them leave to appeal to the Privy Council on the ground that they (the defendants) had not within three months from the date of the order entered into the security required by the Court.

The facts are fully set out in the judgment.

Mitchell, K.C., in support of the motion.

Coldham to oppose.

Cur. adv. vult.

HOOD, J., read the following judgment:—By an order made on the 26th of April 1904 leave was given to the defendants to appeal to the Privy Council from a judgment of the Full Court. That order directed that the defendants should give security to the

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satisfaction of the Prothonotary, and it was ultimately settled that a registered mortgage would be sufficient.

On the 26th of July 1904 a mortgage was executed in duplicate, and on the same day both documents were lodged by the defendants' solicitors at the Titles Office for registration, but no registered mortgage was offered to the plaintiffs, or to the Prothonotary, prior to the 1st of August. Under these circumstances, a motion has been made by the plaintiffs to have it declared that the defendants have waived the benefit of the order giving leave to appeal, by not having entered into the security required by the Court within three months from the date of the order: *Supreme Court Act* 1890, sec. 232.

Upon the face of the documents the mortgage appears to have been registered at 2 o'clock in the afternoon of the 26th July—which would be in time—but it was contended for the plaintiffs that I should go behind the papers and ascertain the actual hour at which the indorsement was made, and that it would then be seen that, for some days at least, the mortgage lay in the office unindorsed. It was admitted by counsel that, until the document was indorsed, the practice of the office was to return it to the person depositing it if demanded. The view for the plaintiffs was that if as a fact the indorsement was not put upon the instrument on the 26th July, the office would merely hold it as agents for the defendants, and that, therefore, there had been no complete delivery thereof: See *Melbourne Tramway Co. v. Fitzroy* (a). It was further urged that the mortgage should have been delivered to the plaintiffs, or to the Prothonotary, on or before the 26th July. I cannot agree with any of these contentions. In the first place the defendants theoretically were entitled to have the mortgage registered when it was delivered, and were not bound by the fact that, owing to stress of work, the registration may not be manually effected for some time to come. Otherwise, if the department were considerably behindhand (as it sometimes is), an appellant might lose all or nearly all the time given to him, because he would have to deposit the document far enough forward to allow for any possible delay in the office. Nor do I think that the practice of the office would make

(a) [1901] A.C., at p. 173.

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HOOD, J.

1904

THE GREAT CENTRAL FREEHOLD MINES LTD. v. CHAPMAN.

it in this case the agent of the defendants until registration. Once the instrument had been lodged in pursuance of the undertaking, the defendants would not have been entitled to demand its return, even with a view of abandoning the appeal, as such a course would be a clear breach of the arrangement between the parties. Moreover, the indorsement on the duplicate mortgage, made under sec. 61 of the *Transfer of Land Act*, is conclusive evidence that the instrument has been duly registered, and that such registration would, in my opinion, include the time of registration, which determines priority. In that view, I cannot go behind the document, which is to be taken as having been registered on the 26th July. I do not think that any delivery of any document to the plaintiffs, or to the Prothonotary, or to anyone else, except the Titles Office, was necessary, because a mortgage under the *Transfer of Land Act* need not be in duplicate, and if it be not there would be nothing to deliver after the instrument was registered, and nothing worth delivering before.

It was urged that this Court held in the case of the *Melbourne Tramway Co.* v. *Fitzroy* that, under the Order in Council, entering into security was equivalent to giving a security, and that this would imply delivery either to the respondent or to some person on his behalf. The Privy Council, however, in the same case, has, I think, indicated that a liberal construction is to be placed upon those words, by holding that the Prothonotary was a person to whom delivery could be made, and in my opinion, delivery to the Registrar of Titles for registration equally enables that official to hold on behalf of the respondent. I find, therefore, that the appellants did enter into the required security within the three months, and this motion will be dismissed, with costs.

Solicitors for plaintiffs: *Lawson & Jardine.*

Solicitors for defendants: *Blake & Riggall.*

W. H. M.

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In re DOUGLAS.

MADDEN, C.J.

1904
July 28.

Legal Profession Practice Act 1891 (*No.* 1216), *s.* 11; 23 & 24 *Vict.*, *c.* 127, *ss.* 10–37; 37 & 38 *Vict.*, *c.* 68, *s.* 4—"*Rules of Supreme Court, 26th November* 1892," *r.* 18—*Barrister and solicitor—Articled clerk—Leave to carry on permanent occupation during service of articles.*

MADDEN, C.J., granted leave to an *employé* in the Customs Department to continue in that employment during the course of his articles of clerkship to a barrister and solicitor of the Court on being satisfied that such employment would not interfere with the performance of his duties as an articled clerk.

Quære, whether there was any power to make the order.

APPLICATION for leave to carry on another employment during service of articles as clerk to a barrister and solicitor.

The applicant, Campbell George Douglas, was a clerk in the Commonwealth Customs Department and had been admitted to the degree of Bachelor of Laws in the University of Melbourne. During his University course he had supported himself and paid his fees out of his salary, and was at the date of the application without means other than such salary. His departmental duties were performed principally before 10 a.m. and after 4.30 p.m., and the solicitor to whom he desired to be articled made an affidavit that his duties as an articled clerk would not be interfered with by the discharge of his departmental duties.

Power for the applicant, in support, referred to *In re Arthur* (*a*); *In re Morley* (*b*); and to *In re Latham* (unreported), in which Madden, C.J., granted similar leave to a college tutor and coach. Rule 18 of S.C.R. (Reg. Gen.) 26th November 1892 shows that the English practice is to be followed in matters not expressly provided for by our Acts or rules. The English practice is to apply for such leave. He referred also to *Ex parte Llewellyn* (*c*); 23 & 24 Vict., c. 127, sec. 10; 37 & 38 Vict., c. 68, sec. 4.

MADDEN, C.J. I must say that I feel judicially conscience-stricken in these applications, for I am afraid I have been tempted

(*a*) [1900] 25 V.L.R. 638.
(*b*) [1898] 25 V.L.R. 639.
(*c*) [1833] 2 Dowl. (Pr. Ca.) N.S. 701.

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to yield to the pressure of hard cases, doing it perhaps because I knew there was another tribunal before which the matter must ultimately come, which could repair any mischief that might be wrought. Nevertheless, I do see that where a meritorious person has already given proof of ambition and industry, and has succeeded in getting his Bachelor of Laws degree, which is no easy one to attain, and that same person now desires to get to the profession, notwithstanding the difficulties which surround him, that this Court should throw obstacles in his way is not an attractive thing to do.

In this case I can see that it is possible for this gentleman to attend to his work in the Public Service and also to the duties necessary to qualify him for admission to the profession. I am therefore loth to thwart such a laudable purpose. I can see the difficulty of the position, for if he does not remain in his present office he cannot live, and if he does remain there there is the danger that he will learn his profession badly. But, remembering the industry that he has already shown, it is probable that he will overcome the difficulties of his studentship at law by giving more energy to it.

In all the other cases I have expressed a doubt whether I have any power to make such an order at all, and as to its use when made. In the present case, in addition to expressing that same doubt, I will also say emphatically that the extreme limit has been reached, and if anyone wants to extend that limit he must go before some other Judge. I make the order asked for in this case for what it is worth.

Solicitor for applicant: *Larkin.*

J. M.

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In the Will of ALFRED HUNT.

HOOD, J.

1904
September 22.

Administration and Probate Act 1890 (*No.* 1060), *s.* 21—*Will—Caveat—Proceedings where caveator does not appear.*

Where the caveator has appeared upon the return day of the order *nisi* but does not appear at the hearing of the case upon the day on which it has been listed for hearing, the Court may make the order absolute without calling upon the executor to prove the will in due form.

THIS was an order *nisi* calling upon the caveator to show cause why probate should not be granted. The executors of the will of one Alfred Hunt were applying for probate; the caveator lodged a caveat and the executors then obtained an order *nisi* calling upon the caveator to show cause why probate should not be granted. Upon the return day of the order *nisi* the caveator appeared, and the matter was then directed to be placed in the list for trial in the ordinary way. When the matter came on in due course, the caveator did not appear.

Pigott for the executors in support of the application—As the caveator does not now appear the Court should now make the order absolute without calling upon the applicants to prove the will in due form. The procedure is the same as under sec. 21 of the *Administration and Probate Act* 1890 when the caveator has not appeared upon the return of the order *nisi*. This is practically the return day; the listing of the matter is merely an adjournment of the return day. In the case of *In re Virtue* (*a*) Hodges, J., appears to have taken a different view; but this is not quite consistent with the order made by the same learned Judge in *In re Buckley* (*b*), when His Honor made an order in the form now asked for.

HOOD, J. I think this hearing is equivalent to an adjournment from the day named in the order *nisi*, and, inasmuch as the caveator does not appear at this adjourned hearing, I think he should be regarded as not appearing upon the day named in the order *nisi*. I make the order asked for.

Solicitors for applicant: *A'Beckett & Chomley* (for *Mackay & Norman*, Beechworth).

W. H. M.

(*a*) [1899] 5 A.L.R. (C.N.) 35. (*b*) [1899] 24 V.L.R. 945.

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MADDEN, C.J.

1904
July 28,
September 5

In the Will of FRANCIS JOSEPH PALMER.

Probate Practice—Testator domiciled in Victoria—Will relating solely to property in foreign country—Admissibility to probate in Victoria.

A will disposing of property in a foreign country only is not entitled to probate in Victoria, though the testator be domiciled in Victoria.

In the Goods of Coode ([1867] L.R. 1 P. & D. 449) and *In the Goods of Tamplin* ([1894] P.D. 39) followed.

In the Goods of Harris ([1870] L.R. 2 P. & D. 83), *In the Goods of Howden* ([1874] 43 L.J. P. & M. 26), *In the Goods of Winter* ([1861] 30 L.J.P. & M. 56), and *Spratt* v. *Harris* ([1833] 4 Hag. 405) distinguished.

APPLICATION FOR PROBATE.

The will of which probate was sought by the executors appointed thereby was dated 2nd April 1904, and, omitting formal parts, was as follows:—"I give devise and bequeath unto my brothers Frederick George Palmer and Alfred Palmer and I do hereby appoint them as executors of this my will in trust for the benefit of their children in equal shares of all my right title and interest in the one-tenth share under the deed of separation between my father and mother trustee of the said settlement being Henry Farnham Burke Esquire of the College of Arms Queen Victoria-street London subject to the encumbrances."

Alan Skinner in support of the application.

The argument and the authorities cited sufficiently appear from the judgment.

Cur. adv. vult.

MADDEN, C.J., read the following judgment:—The testator, who was resident in Victoria, made a will, whose operation was wholly confined to specific personal property in England, and did not relate to any property in Victoria. He was possessed of personal estate in Victoria to the value of 20*l.*, but the will does not in any way include that. The executors have applied here for probate of this will.

According to my recollection, it has always been the practice in Victoria to refuse probate of any instrument which was not

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a general disposition of the testator's property, or which did not at least expressly dispose of property of the testator situate or being in Victoria. It was, however, contended that the authorities in England were to the contrary of this practice, and that there was no reported decision to support it in Victoria, and that as personalty is considered to attach to the person of its owner, the country of his domicile can always grant probate of a will relating to personalty wherever it may be situate. I have examined the cases cited to me, and in my opinion they in fact support the practice which I believe, and which I have been informed by the Registrar, has prevailed here.

In the Goods of Coode (*a*) decides distinctly that where a testator, though domiciled in England, leaves a will disposing of property in a foreign country only, such a will cannot be admitted to probate in England. This is a case clearly in point against the present application.

Mr. Skinner relied, however, on two cases—*In the Goods of Harris* (*b*) and *In the Goods of Howden* (*c*). In the former case the testator made a will disposing of property in Tasmania only, and appointed executors of it. Later he went to reside in England, and he there made a second will, which disposed of property in England only, and he appointed other executors of it. This will expressly referred to the Tasmanian will, and ratified and confirmed it. The Court admitted both instruments to probate in England, but on the ground that they together were intended to operate as one will. The latter of the two cases was to the like effect, and the two wills were admitted to probate on the like principle.

Another class of case was also cited—*In the Goods of Winter* (*d*). In this instance a testator left two wills—one disposing of property in a foreign country only, the other disposing of property in England only. He appointed the same persons executors of both wills, and because of that fact Sir Cresswell Cresswell granted probate of both wills in England, intimating, however, that, but for it, the Court would not have had authority to deal with property not within the jurisdiction.

(*a*) L.R. 1 P. &. D. 449.
(*b*) L.R. 2 P. &. D. 83.
(*c*) 43 L.J.P. & M. 26.
(*d*) 30 L.J.P. & M. 56.

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MADDEN, C.J

1904

IN THE WILL OF PALMER.

Another authority cited was *Spratt* v. *Harris* (*e*). The testator left two wills also—the one disposing of his personal property in France; the other disposing of his realty and personalty in England. He did not appoint executors of either will. It was shown that the testator's personalty in England was not sufficient to pay his debts there; and as a testator's personalty is all liable for his debts, wheresoever it may be, even though the will attempts to apply it otherwise, and as, in the absence of any executor of the French will, the testator's widow in England was charged with the payment of his debts, she was entitled to administration *cum testamento annexo* of both wills, so that she might discharge this duty; and such administration was granted to her in England of both wills.

None of these four cases, therefore, in any way alters the effect and authority of *In the Goods of Coode* (*f*), but each of them proceeded on a ground which recognized its principle, but found exceptional conditions which showed that it did not there apply.

There is another case—*In the Goods of Tamplin* (*g*)—in which the Court acted on the principle of *In the Goods of Coode*, and pointed out that, in conditions similar to those that existed in the cases above cited, probate might be granted in England of a will of foreign property. This case, therefore, tested and upheld *In the Goods of Coode* both ways, although it is remarkable that none of the cases above discussed appear to have been cited to the Court.

In *Tamplin's Case* a testator left two wills—the one disposing of personal property in Russia exclusively; the other of real and personal property in England exclusively. He appointed different executors of each will, and there was no reference in either will to the other, so as to suggest any intention that they should constitute one will. Application was made in England for probate of both wills, and the executors of both joined in the application. The Court refused to grant probate of the Russian will notwithstanding, on the ground that the Court had no authority to deal with a will disposing of property in a foreign country exclusively.

In my opinion the cases of *In the Goods of Coode* and *In the*

(*e*) 4 Hag. 405. (*f*) L.R. 1 P. & D. 449.
(*g*) [1894] P.D. 39.

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Goods of Tamplin dispose of the present application, and I therefore refuse it. I give leave for the will to be taken off the file.

MADDEN, C.J.
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IN THE WILL OF PALMER.

Probate refused.

Solicitor for the applicants: *M. H. Davies.*

H. I. C.

THE KING *v.* KING *and Another.*

F.C.
1904
September 5, 6.

Land Tax Act 1890 (*No.* 1107) *ss.* 3, 35–38, 40–42, *Seventh Schedule—Person properly on the Land Tax Register in respect of land—"Landed estate"—"Land"—Sale of portion of land—Notice to Registrar of sale—Acknowledgment of sale by purchaser—Effect of omission to send notice and acknowledgment—Liability of person on register—Liability in respect of land undisposed of after notice of sale to Registrar—Reclassification and revaluation, necessity for—"Evidence"—Effect of Land Tax Register as evidence—Removal of name from register.*

The respondents were properly placed on the Land Tax Register as the owners of a landed estate comprising 21,894 acres, and as liable to pay the land tax thereon, and a notification to such effect was published in the *Government Gazette* of 13th June 1899. By transfer, dated 16th February 1900, they sold portion of the said estate—viz., 150 acres—which was not, however, removed from the register until October 1903. The respondents did not at any time forward to the Registrar a notice of this sale in the form of the Seventh Schedule to the Act, but duly made demand to have the remaining 21,744 acres reclassified and revalued under the Act, which, however, was never done. Before the expiration of the half-year commencing 28th August 1900 the respondents sold and transferred the whole of the remaining 21,744 acres to another purchaser, and the case as stated admitted that thereupon their liability to tax in respect of the whole estate ceased.

Held, that the respondents were liable to pay land tax in respect of the whole 21,894 acres for the half-years commencing 28th February 1900 and 28th August 1900.

Sec. 41 of the *Land Tax Act* 1890 applies to the case where a person who is properly placed on the Land Tax Register in respect of any land has parted with his interest in part only of such land, as well as to the case where he has parted with his interest in the whole of such land: *The Queen* v. *Gidney* ([1899] 25 V.L.R. 81, 82). So that where part only of the land has been parted with, the liability of such person to land tax in respect of the whole land continues until the notice and acknowledgment contemplated by the section have been forwarded to the Registrar.

Quære, whether when such notice and acknowledgment have been given and the name of the transferee of such part of the land has been entered upon the register in respect thereof, the transferor is liable to land tax in respect of the untransferred portion of the land without a fresh classification and valuation thereof in accordance with the Act.

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Secs. 35–38 of the *Land Tax Act* 1890 are auxiliary to secs. 41 and 42 of the Act, so that if, after the giving of the notice and acknowledgment in the form in the Seventh Schedule, the Registrar does not remove the name of any person from the register in respect of any land or part of any land with his interest in which he has parted, such person may obtain an order *nisi* to compel him to do so.

Sec. 40 of the *Land Tax Act* 1890 makes the Land Tax Register "conclusive evidence" against any person whose name is thereon in any of the proceedings contemplated by the section, unless the Court before whom such proceedings are pending has allowed them to stand over to permit of an application for the removal of his name from the register, and such application has been successful.

SPECIAL CASE agreed to by the parties, and referred by Holroyd, J., to the Full Court.

This action was commenced by a writ of *capias ad respondendum*, issued on the 10th day of November 1903, whereby His Majesty claimed from the respondents the sum of 817*l.* 5s. in respect of land tax on estate No. 634 for the following periods, viz.:—The half-year commencing the 28th August 1889, 273*l.* 13*s.* 6*d.*; the half-year commencing the 28th February 1900, 271*l.* 15*s.* 9*d.*; and the half-year commencing the 28th August 1900, 271*l.* 15*s.* 9d.; and also interest on each of such half-yearly amounts of land tax at 8 per cent. per annum from the 1st December 1899, the 1st June, 1900, and the 1st December 1900 respectively to date of judgment; and pursuant to the leave given by the order herein, dated the 1st day of December 1903, the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:—

1. In the month of June 1878 certain lands in Victoria forming in extent one area of 21,894 acres of freehold, belonging to one Robert Moffatt, and known as Lake Bolac station, were under and in accordance with the provisions of the *Land Tax Act* 1887 classified as a landed estate as of the third class and numbered 634 and the same were at all times material to this action valued for the purposes of the said Act over and above the sum of 2500*l.*; and such classification and the valuation of the lands comprised therein and also the name of the said Robert Moffatt as owner of the said landed estate No. 634 were duly entered by the Registrar of Land Tax in the Land Tax Register, as provided by the said Act.

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2. The said Robert Moffatt duly paid all land tax payments in respect of the said landed estate, No. 634, up to the time of his death, which took place on the 7th day of February 1884.

3. After the death of the said Robert Moffatt the respondents Robert Craig King and Hugh Hutcheson, who are the present trustees of the will of the said Robert Moffatt, were placed on the Land Tax Register as owners of the said landed estate No. 634; and on the 13th day of June 1899 a notification appeared in the *Government Gazette* of that date that they were entered in the Land Tax Register as owners of the said landed estate No. 634, and as such liable to pay land tax on 21,894 acres comprising that estate for the half-year commencing the 28th day of February 1899; and all acts and things were done and all events happened necessary to render them liable for land tax in respect of the said landed estate, and they duly paid land tax therefor up to but not including the half-year commencing the 28th day of August 1899, when they refused to pay further land tax, for the reasons stated in paragraph 4 hereof, since which time they have not paid any land tax in respect of the said landed estate up to the half-year commencing the 28th day of August 1900, at the expiration of which last-mentioned half-year their liability to pay land tax in respect of the said landed estate ceased by reason of the fact that they sold and transferred the same to one Peter Tyson.

4. On or shortly prior to the 23rd day of February 1900 the respondents sold a portion of the said alleged landed estate, No. 634, comprising 150 acres or thereabouts, and the same was transferred to the purchaser by transfer dated the 16th Feburary 1900, and was, but not until October 1903, removed from the Land Tax Register, and the taxed area of the said alleged estate reduced to 21,744 acres; but such reduced area has never been classified or valued under or in accordance with the provisions of the said *Land Tax Acts*, although demand was duly made on behalf of the respondents to have the same revalued.

5. The respondents have paid into Court the sum of 369*l.* 5*s.* 8*d.*, being the sum of 273*l.* 13*s.* 6*d.* claimed from them in the said writ of *capias ad respondendum* as the land tax on the said estate No. 634 for the half-year commencing the 28th August 1899,

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and 95*l.* 12*s.* 2*d.* interest thereon at 8 per cent. per annum from the first day of December 1899 to date of payment into Court; and it is agreed that the Court shall direct judgment to be entered for His Majesty for the said sum of 369*l.* 5*s.* 8*d.*, with so much of the costs of this action as relate to the claim for the said half-year up to the date of such payment in; and in respect to the balance of the said claim they contend that in the circumstances hereinbefore mentioned they are not liable to pay any land tax in respect of the said alleged landed estate No. 634 or any part thereof for the two remaining half-years in dispute.

The question for the opinion of the Court is whether the contention of the respondents as set forth in paragraph 5 of this case is correct.

If the Court shall be of opinion in the affirmative of the said question, then judgment shall be entered for the respondents.

If the Court shall be of opinion in the negative of the said question, then judgment shall be entered for His Majesty for the sum of 543*l.* 11*s.* 6*d.*, being the balance of the said claim with interest as claimed.

It is agreed that the question of the costs of this action, save as hereinbefore provided for, shall be in the discretion of the Court.

Isaacs, K.C. (with him *Hayes*), for the Crown—The respondents were "properly placed upon the Land Tax Register" within the meaning of sec. 44 of the *Land Tax Act* 1890 and have never been taken off. The estate is still a "landed estate" within the meaning of the Act, and they are still the owners.

He referred to *The Queen* v. *Gidney* (*a*) and the *Land Tax Act* 1890, sec. 41.

(He was stopped.)

Mitchell, K.C., and *Cussen* for the respondents—Sec. 41 does not apply to the case of the sale of a portion of the land, but only to a sale of the whole. Sec. 35 applies to this case. The best part of the land may be sold, and there must therefore be a reclassification and a revaluation of the remainder.

(*a*) [1899] 25 V.L.R. 81, 82.

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[HODGES, J. As long as you are on the register, does not sec. 41 make you liable? Under sec. 35 you may be left on the register for portion of the land. Is there any section relating to reclassification?]

I do not think so. The classification of the remainder would be a reclassification. It would be the classification of a different landed estate, which would have to be classified for the purposes of the Act. The respondents' argument is based on this—that unless a man is the owner of a "landed estate" he is not taxable. The estate in respect of which the respondents are now on the register has never been classified. The Act can be conveniently divided into several parts. The taxing sections are down to sec. 9. The questions whether there is a certain acreage of land, whether that acreage is within a certain area, whether the land is valued over and above 2500*l.*, and whether the person sought to be taxed is the owner of the land, are all questions of fact to be decided by the Court. The only other things which are conditions precedent to liability are classification and valuation for the purposes of the Act. That does not mean entry of the classification or valuation in the register, but this Court has held in *Gidney's Case* (*b*) that it means the publication of the classification and valuation in the *Government Gazette*, which is prior altogether to the entry in the register: See sec. 19. Secs. 10–29 show how valuations for the purposes of the Act are to be made. Classifiers are to classify and value. They make their reports to the Commissioners, who publish them in the *Government Gazette*; and then the liability to tax arises: *Cf.* sec. 54. Although never on the register at all, a man would still have to pay. Secs. 31–44 constitute what may be called the "administrative portion" or the "office sections" of the Act, dealing as they do with the compilation of the "Land Tax Register" and the "valuation for Victoria." Liability does not depend on them at all, though sec. 34 makes a copy of the *Government Gazette* in which they are published "sufficient evidence," while sec 40 makes the register "evidence"—not "conclusive evidence," which is the common expression in Acts of Parliament. The Register is kept in the office merely for the convenience of making up accounts. It

(*b*) 24 V.L.R. 795; 25 V.L.R. 81.

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is primarily a document dealing with ownership: See sec. 31. When once it is made the Commissioners have nothing whatever to do with it. The Registrar alters it from time to time, but he has nothing to do with classification or valuation. The book referred to in sec. 32 is also kept merely for office purposes and for the making out of accounts. It is a copy of the classification which has been previously published in the *Government Gazette*. Sec. 41 merely says that a person whose "name is properly placed upon the register" "shall *for the purpose of estimating his liability* under this Act be deemed an owner of such land;" not that he shall be deemed an owner for all purposes of the Act. The word "estimating" refers to the making up of the account in the office. If the word "fixing" had been used, the meaning would have been entirely different. Though sec. 46 seems to tell against the respondents' contention, yet even that section shows the crucial test of liability to tax to be whether "the classification of the land has been published in the *Government Gazette*."

[HODGES, J., referred to sec. 42. When a purchaser signs an acknowledgment he becomes *primâ facie* liable.]

The register is *primâ facie* evidence against you until your name is taken off.

[HODGES, J. But you cannot get your name taken off until you supply a new taxpayer.

MADDEN, C.J. You could compel the Registrar under secs. 35 and 36 to remove your name from the register. The words "properly placed" in sec. 41 are important. The fact that the name is improperly on the register is of no effect if it has been "properly placed" there.

HODGES, J. According to your argument a man might sell an acre of his land, and by saying nothing about it might evade the land tax altogether.]

Sec. 39 provides for cases of that sort, in addition to which he would run the risk of having the sale regarded as not being in fact *bonâ fide*. *Cf.* also sec. 13. Until *The Queen* v. *Gidney* (c) is overruled, the respondents can rely upon it as establishing the proposition that the register is not conclusive evidence.

(c) 24 V.L.R. 795; 25 V.L.R. 81.

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Isaacs, K.C., in reply—The words "for the purpose of estimating his liability under this Act" in sec. 41 refer to sec. 6. If you "estimate liability" you assume that liability exists. The Act draws a clear distinction between "land" and "landed estate." Sec. 41 does not say "landed estate;" it says "land." Notwithstanding the register, a person may prove that the land was never valued, or any other facts—except the fact that he has parted with the land—that show he is not liable to tax. Sec. 41 applies to part of the land as well as the whole. If it had meant the whole of the land, and not also a part, it would have used the words "landed estate." That section constitutes an estoppel to the respondents. If a man is not "properly placed" on the register within the meaning of sec. 41, he can proceed under sec. 35 to have his name removed therefrom either in respect of the whole or part of the land. Sec. 35 enables him to say—"Whether I was 'properly placed' on the register or not, I am improperly there now." So also, if the Registrar does not take him off under sec. 42, he may proceed under sec. 35 and compel him to do so. Until the provisions of sec. 41 are complied with, the Crown is protected from secret dealings. It is possible that the vendor may have the right to say—"Now classify my present estate." I do not know, however, of any provision for reclassification. It may be that the Crown would have to set to work to classify the land which the vendor retains as a new landed estate; probably that is the reason for the notice referred to in sec. 41. No notice in the form of the Seventh Schedule was ever given by the respondents.

[*Cussen*—I admit that is so.]

Cur. adv. vult.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HODGES and HOOD, JJ.] This is an action by which His Majesty seeks to recover from the respondents two several sums of money in respect of land tax. As to one of those sums, accruing before the year 1900, judgment is admitted. As to the other of those sums, accruing in the year 1900, the case is defended. A case has been stated which presents to us the admissions between the parties on which the judgment of the Court is to proceed;

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and they show that, prior to the time at which the land tax is alleged to have accrued, the respondents had been properly placed upon the Land Tax Register in respect of certain land—a large quantity of 21,894 acres. Subsequently, but prior to the date at which the land tax claim in question here would have accrued, 150 acres of the total acreage were sold and conveyed to some purchaser. Then it is contended that, because the original landed estate, such as it was, and such as it appeared upon the register, has been reduced in acreage—in this case by 150 acres—the original ascertainment of the landed estate has been disturbed; and that thereby there is a new landed estate created, which needs to be reclassified and therefore to be revalued, before it can be a landed estate liable to duty under the Act. This is urged as a sort of corollary to the decision of this Court in the case of *The Queen* v. *Gidney* (*d*). In that case the original landed estate properly on the register—818 acres—was so far disturbed that a large portion of it—645 acres—had been sold to a purchaser, the respondent Gidney, who was at once, so to speak, seized upon by the Crown, which took it for granted that, because the land then bought had formerly been valued and classified as a landed estate, this part of it, being itself sufficient in point of acreage to be a landed estate, might be put upon the register as a landed estate without any new valuation or classification; and it was so placed on the register. The Crown then brought an action against Gidney, who defended it on the ground that he had never been properly placed on the register; that the land, having been removed from the landed estate, was at large, and remained at large until it got on the register again by virtue of valuation, classification, and registration; and the Court, approving of the decision of my brother Hodges, held that that was the correct view; that the land, being once excluded from the original landed estate, was at large, and being at large, it was just the same as if it had never been classified at all; and that therefore it would have to be classified of itself. It is said that the proposition in the present case is one arising out of that, and that it necessarily must be that, if that portion of the land which comes off the register is land in respect of which there must be a new classification, and

(*d*) 24 V.L.R. 795; 25 V.L.R. 81.

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therefore a new valuation, the fragment that remains on, being disturbed, and the valuation thereof being disturbed, there must be a reclassification and a revaluation of it too; because the taking away of the part which goes out to the purchaser might have the effect of reducing the classification altogether of that which remains, by reason, as it has been put, of the "very eyes" being taken out of it. It is said that that portion of the land which remains may be fourth class only, while the whole was third class before, or that the remainder may be third class only, where formerly the whole had been second class, and so on; and that therefore it would be extremely unjust that it should remain on the register without being reclassified, and that it must be reclassified in order to arrive at its true value for taxing purposes. We have, therefore, to ascertain whether that proposition also, as well as the proposition in *Gidney's Case* (*e*) is true.

That, of course, must depend upon the interpretation of several sections of the *Land Tax Act* 1890 which have been referred to. We have given this matter the best attention possible, but we are far from saying that we are content with the view we take as being logically or demonstratively correct; and we cannot say that it is possible to imagine any intelligible or convincing interpretation of the sections as they stand. We find that we cannot interpret them with any degree of lucidity, but all we can do is to adopt that line of reasoning, which gives the best meaning to the language in them, and which, while avoiding injustice, does the justice of making all those intended to be affected by the consequences of the Act bear the tax which they ought to pay. It is quite clear that somebody must put up with apparent injustice, and the best reading that can be given is one which will uphold the Act, and at the same time do the least possible injustice.

In the present case what appears to us to be the key of the position is this—what is the meaning of sec. 41? If one reads the language of that section just as it appears, it would seem to indicate an intention that a landed estate, which has been properly placed on the register, may as a whole be disposed of by the original proprietor to some new proprietor; that if that is done,

(*e*) 24 V.L.R. 795; 25 V.L.R. 81.

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a notice, in the form or to the effect of the Seventh Schedule, may be given, notifying the sale to the purchaser; and that then the section arrests the liability of the man already on the register. Sec. 42 then gives to the Registrar the right, upon receiving an acknowledgment in the form in the Seventh Schedule, to put the purchaser on the register if apparently he sees it is proper to do so. The literal reading of those two sections would lead to some such conclusion as that. Their language is general, and therefore that would be the first literal meaning of them. But if that be so, it is exceedingly difficult to see by what means a person who is on the register and who has sold part only of his estate is to get rid of his liability in respect of that part, or, it may be, his whole liability, because he may, either in one hand, or by gradual sales, have sold so much of his land as would reduce it to less than a landed estate; and still he could not by any means procure the recognition of the person or persons to whom he has sold as the owner or owners of the land, but he himself would, by the first literal reading of these sections, be made to appear to be still the owner of the whole estate.

Then it is said that sec. 41 may be read reasonably as contemplating, not only the case where the registered owner parts with the whole of his estate, but also the case where he parts with portion of it; and that the Registrar under sec. 42 is given the opportunity and the right to place the purchaser of part only upon the register, as well as the purchaser of the whole, where either of those two events occurs. We are asked, therefore, to say that, notwithstanding its apparent comprehensiveness, sec. 41 does admit of that reading; and it has been pointed out to us that, while this Act, like some other Acts which could be mentioned, begins with an artistic plan whereby certain language is once adopted with the intention that throughout the Act it shall have its artistic meaning, such language is departed from in places. Amongst other things, the words "landed estate" are given in this Act a very specific meaning for a very specific purpose. But in sec. 41 we find that language not appearing. Sec. 41 runs thus:—"Where the name of any person is properly placed upon the Land Tax Register in respect of any land"—the expression "landed estate" is given up and the word "land" used instead—

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"such person shall for the purpose of estimating his liability under this Act be deemed an owner of such land notwithstanding that he may have afterwards parted with his interest in the same to any other person until he has forwarded to the registrar a notice and acknowledgment in the form or to the effect in the Seventh Schedule hereto signed by himself and the person to whom he has parted with his interest in the same in the presence of some commissioner of the Supreme Court for taking affidavits or some justice of the peace." Now that fact itself seems eloquent as to some intention on the part of the Legislature to depart from the view that a "landed estate" is that concrete thing which consists of upwards of 640 acres, either in one spot or in several places less than five miles apart, and which is valued for the purposes of the Act at upwards of 2,500*l*. It is clear that the Legislature has departed from a "landed estate" in that meaning; and it has taken the ordinary word "land" and means land, whether a landed estate or not, which is in fact on the register. It is said that, that being so, it is reasonable to infer that, where "land" is the word used, the exception is that the person whose "name is properly placed upon the register" in respect thereof, is to be "deemed an owner of such land notwithstanding that he may have parted with his interest in the *same* to any other person," and is to be deemed a person liable until the notice required by the section is given; and it is said, therefore, that, if all the land on the register or any portion of it is parted with, then he has "parted with his interest in the same" within the meaning of the section. Therefore it is said that we may read sec. 41 as conveying the intention that, where part only of the land is parted with, the notice contemplated by the section may be given to the Registrar; that the Registrar may then under sec. 42 enter the name of the purchaser upon the register in respect of the land so parted with; and that the liability of the person who was originally on the register in respect of the whole land may be regarded as attaching to the land which remains upon the register in his name.

Now that that reading may be given is shown in the judgment of the Full Court in *Gidney's Case* (*f*). It is said that the statement of myself to this effect in delivering that judgment is only a *dictum*.

(*f*) 25 V.L.R. 81, 82.

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It is, I think, more than that. It is true that my brother Hodges in the Court below proceeded on the assumption contained in an admission between the parties that the 645 acres which Gidney had purchased no longer belonged to the person who was the original owner of the land; that that land was abroad, and was of itself of sufficient area to constitute a "landed estate;" and that therefore there must be a reclassification of it, because unless there was a classification of it it could not be put on the register, and therefore the Commissioners would not be entitled to tax it; and on that assumption he held that the new land could and ought to be reclassified and revalued. The Full Court, apparently looking for the reason of that, went into the question whether sec. 41 could have the meaning I have suggested, and the view of the Court is expressly put that the section can be read as applying to a part as well as to the whole of the land. We therefore think that that is a decision of this Court to that effect. There is also another case—the case of *The Queen* v. *Blackwood* (*g*)—which bears relation to this point. In that case the matter turned ultimately upon another question; but, in preparing the special case between the public department and the defendant, the case admitted, apparently, that sec. 40 of the Act in question there—sec. 41 of this Act—did relate to the case where part of the land has been disposed of and not merely to the case where the whole has been disposed of. Therefore that reading apparently has been already given to sec. 41.

Then we find that sec. 40 provides that—"In all proceedings in any Court of justice touching the liability of any person to land tax other than a proceeding to remove the name of such person from the Land Tax Register the Land Tax Register shall be evidence against such person, but any such Court before which any such proceeding is pending may if it seem fit upon such terms as may seem just order any such proceedings to stand over and allow any such person to make an application for the removal of his name from such register." Now the present case is "a proceeding in a Court of justice touching the liability of a person to land tax other than a proceeding to remove the name of such person from the Land Tax Register." It appears also in the present case that, for some reason

(*g*) [1890] 16 V.L.R. 157.

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which has seemed good to the respondents, they have never given the notice in the form in the Seventh Schedule such as is contemplated by sec. 41, and therefore it appears to us that that section does refer to the whole of the original landed estate even after the 150 acres was sold; that the respondents are persons who were "properly placed upon the Land Tax Register in respect of any land," viz., the whole of the original landed estate; and that such persons are "for the purpose of estimating their liability under this Act to be deemed owners of such land notwithstanding that they may have afterwards parted with their interest in the same to any other person until they have forwarded to the Registrar a notice and acknowledgment in the form or to the effect in the Seventh Schedule hereto signed by themselves and the person to whom they have parted with their interest." We think therefore that, in the absence of that particular notice, the liability which sec. 41 attaches to the defendants has not been arrested. Sec. 40 therefore makes the register "evidence" of their liability, and against that evidence of liability they have not asked the Court to suspend this action in order to enable them to make application for the removal of their names from the register. Sec. 40, like its congener sec. 41, is exceedingly difficult to understand, not that upon its own face it is not simple enough, but because it abandons the use of words generally used in sections of the kind and thoroughly well understood in their meaning. It does not make the Land Tax Register "*primâ facie* evidence" or "conclusive evidence," both of which are thoroughly well understood terms. Nor even does it declare, to use the words in sec. 34, that it shall be "sufficient evidence," which is not much more definite, but nevertheless is a phrase which has received judicial interpretation in *Gidney's Case* (*h*); but it simply puts it that "the Land Tax Register shall be evidence against such person." But, apparently, although the section merely says that it is to be evidence against such person, one would imagine it is to be conclusive evidence unless the one loop-hole given by the section is taken advantage of. He has a right to apply to the Court to allow the proceedings to stand over so that he may have an opportunity of clearing the register of his name, and the Court would then

(*h*) 24 V.L.R. 795.

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be bound to give him that opportunity. It appears, therefore, that sec. 40 means that, if no such application is made, then the register is to be conclusive evidence; that if such application is made and fails, then again the register is to be conclusive evidence; and if judgment be stayed, but no application be made to remove the name from the register, then again the register is to be conclusive evidence.

It is not possible to give sec. 40 any other meaning at all unless it be such as to make the register "contingently conclusive" evidence, which is somewhat like a contradiction in terms. It appears, however, to be the best that can be said of this doubtful section. The next thing to be considered is this: Sec. 35 provides that "Any person whose name is upon the Land Tax Register in respect of any land" (again using the expression "land" and not "landed estate") "may at any time apply to the Registrar to remove his name therefrom in respect thereof." Then secs. 36 to 38 make provision by means of which, if the Registrar decides against the application, he may notwithstanding be compelled to do what seems right to the Supreme Court upon the hearing of the matter before it. But it seemed to be put that, if a person originally on the register had sold a portion only of his land to another person sec. 35 might apply to that case so as to enable that portion to be dealt with; but that sec. 41 can relate to the case only of a disposal of the whole estate. But the language of sec. 35 makes it impossible apparently to provide for the case where part of the land is sold to a purchaser, and the remaining land remains with the person on the register, but itself is less than a landed estate. The language of sec. 35 does not admit of those two meanings, though it may admit of one. It was also contended in respect of sec. 35 that it merely applies to the case where in the first instance a person was erroneously put upon the register either as to the whole or as to part of the land; that then an application might be made to rectify the register; but the section had no application to the case of a man properly upon the register who has subdivided his land and disposed of portion of it. The Act suggests very strongly some such view as that; but on the other hand it seems a curious thing that, if sec. 41 does relate to the disposal of part of a landed estate, there should be no means

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whatever to compel the Registrar to do what is right or just in that case. One can easily understand the Registrar hesitating to put on the register the purchaser of portion of a landed estate. The case has been instanced of where an estate of, say, 1200 acres has been put on the register in the names of two persons. If those two persons were to operate so as to divide the land equally, so that each would have 600 acres, then neither would be liable to land tax. In such a case it might be a *bonâ-fide* transaction, and nothing more could be said. But on the other hand the Registrar might think that it was not a *bonâ-fide* transaction and he might refuse to alter the register, because he has a discretion given to him in this connection by the word "may" in sec. 42. But supposing he took a view which was erroneous, and refused to register a man entitled to be registered; then apparently there would be no means under secs. 40 and 41 of compelling him to do what was right. We therefore think that the meaning and effect of secs. 35 to 38 is this—that sec. 41 being capable of being applied to the disposal of a part, as well as of the whole, of a landed estate, if part or the whole is disposed of, then sec. 35 provides the legal machinery by which at any time any person may apply to the Registrar to remove his name from the register. If that is not done, he may proceed by the proper remedy to compel the Registrar to do so. Therefore, if we make sec. 35 auxiliary to sec. 41, the whole thing is very clear. The first thing to be done is to give the notice in the form of the Seventh Schedule. Then the suit is arrested. The Registrar must therefore exercise his discretion. If this be unsatisfactory, then an application may be made, and if the Registrar do not do what is demanded of him, the applicant may obtain an order *nisi* from the Supreme Court to compel him. So the whole thing will work out to some definite and coherent conclusion.

As to the argument that sec. 35 was only intended to apply to original registrations made when the Act was first brought into operation, one would suppose that if that were intended there would be some limitation of time in the Act, but there is no such limitation. But what the Act does apparently provide for is that any person may, in respect of any land at any time, make an application to have his name removed from the register. That would fit itself

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into any case in which any person has been properly placed on the register in respect of any land. It would allow an application to be made in the form of the Seventh Schedule. One other suggestion was made by Mr. Isaacs yesterday in answer to the embarrassing question as to what was to become of the land which remains on the register after portion of a landed estate is disposed of. Mr. Isaacs said, at the moment, that it might be that that portion of the land which is not disposed of might have to be classified. We offer no opinion on that case, because in this case the condition precedent—viz., the giving of a notice in the form of the Seventh Schedule—has not been complied with. When that is done the question may arise whether or not the land remaining should be reclassified. We offer no opinion on that now. We answer the question put to us—"No, it is not." We therefore direct that judgment be entered for the Crown, according to the agreement in the special case, with costs.

Judgment for the Crown, with costs.

Solicitor for the Crown: *Guinness*, Crown Solicitor.
Solicitors for the respondents: *Whiting & Aitken.*

H. I C.

[His Honor Mr. Justice Hodges has favoured the editor with the following reasons for concurring in the judgment of the Court: —"The respondents' names were properly placed on the register in respect of a landed estate. For the purpose of determining their liability under the *Land Tax Act* 1890, sec. 41 provides in effect that they are to be deemed the owners of every acre of land in that estate (notwithstanding that they may have afterwards parted with all or some of it) until they have forwarded to the Registrar the notice to the effect in the Seventh Schedule as to the whole or some portion of the land in respect of which they are registered." —J. B. B.]

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In re WEINGARTEN BROTHERS' TRADE MARK.

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1904
May 19, 20, 24, 25, 26, 27, 30, *August* 12.

Trade Marks Act 1890 *No.* 2 (*Act No.* 1183), *s.* 8—*Trade mark—Essential particulars—Added matter—Disclaimer—Registration of letters as part of trade mark—Rectification of the register—Delay on part of applicant—Who may apply to have register rectified.*

Letters, words, or figures may be so used in combination with other matter as to form part of a distinctive device capable of being registered as a trade mark.

Where they are so used they are not "added matter" and need not be disclaimed under sec. 8 (2) of the *Trade Marks Act* 1890 (No. 2).

In re Clement et Cie.'s Trade Mark ([1900] 1 Ch. 114); and *In re Apollinaris Co.'s Trade Mark* ([1891] 2 Ch. 186) followed.

In re Hudson's Trade Marks ([1886] 32 Ch. D. 311) and *In re Atkin's Trade Mark* (3 R.P.C. 164) not followed on this point.

But where the device consists of letters, words, or figures merely colourably combined with other matter and it is clear from all the circumstances that what is really intended to be registered is the part consisting of letters, words, or figures, the device is not "distinctive," and if registered as a trade mark the register will be rectified by its removal.

The respondent, a corset manufacturer, was the registered proprietor in Victoria of a trade mark containing the letters W.B.

The applicant, also a corset manufacturer, was the registered proprietor in England of a trade mark also containing the letters W.B., and was a rival of the respondent's in the corset trade of Victoria.

Held, that as the retention on the Victorian register of respondent's trade mark might lead people to suppose that it had the exclusive right to the use of the letters, although that would not be its legal effect, the applicant had sufficient interest to entitle him to apply for its removal from the register.

MOTION to rectify the Register of Trade Marks.

The facts and arguments, so far as material to this report, sufficiently appear from the judgments.

Duffy, K.C., and *Coldham* for the applicant in support.

Isaacs, K.C., and *Mitchell* for the respondents to oppose.

Counsel referred to the following cases:—*In re Smokeless Powder Company's Trade Mark* (a); *Somerville* v. *Schembri* (b); *Payne* v. *Daniels* (c); *Newman* v. *Pinto* (d); *Lewis* v. *Goodbody* (e); *In re Edgington's Trade Mark* (f); *In re Leonard & Ellis's Trade Mark* (g); *In re Cheseborough's Trade*

(a) [1892] 1 Ch. 590.
(b) [1887] 12 App. Cas. 453.
(c) [1893] 2 Ch. 567.
(d) [1887] 57 L.T. 31.
(e) [1892] 67 L.T. 194.
(f) [1889] 61 L.T. 323.
(g) [1884] 26 Ch. D. 288.

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Mark (*h*); *Goodwin* v. *Ivory Soap Co.* (*i*); *In re Wood's Trade Mark* (*k*); *Baker* v. *Rawson* (*l*); *Ex parte Stevens* (*m*); *Pinto* v. *Badman* (*n*); *In re Wright, Crossley & Co.* (*o*); *In re Clement et Cie.'s Trade Mark* (*p*); *In re Hudson's Trade Mark* (*q*); *Eastman Photographic, etc., Co.* v. *Comptroller-General* (*r*); *Re Atkinson's Trade Mark* (*s*); *Rosenthal* v. *Reynolds* (*t*); *Re Player & Son's Trade Mark* (*u*); *In re Royal Baking Powder Co.* (*v*); *Re Colman's Trade Marks* (*w*); *In re Dexter's Application* (*x*); *Jamieson* v. *Jamieson* (*y*); *Benedictus* v. *Sutherland* (*z*); *In re Coleman's Trade Mark Application* (*a*); *Re Foulder & Co.'s Trade Marks* (*b*); *In re Bryant & May's Trade Mark* (*c*); *Re Crompton & Co.'s Trade Mark* (*d*); *Wolfe* v. *Lang* (*e*); *Mitchell* v. *Joshua* (*f*); *In re Brind* (*g*); *In re Hicks's Trade Mark* (*h*); *In re Burland's Trade Mark* (*i*); *Kerly on Trade Marks* (2nd ed.), pp. 132, 151, 179, 198, 258, 259, 271; *Trade Marks Act* 1890 No. 2 (Act No. 1183), sec. 8; and the English *Trade Marks Acts* of 1875 and 1883.

Cur. adv. vult.

August 12.

MADDEN, C.J., read the following judgment:—This is an application by way of motion by William Pretty and Sons Limited to have the Register of Trade Marks rectified by removing therefrom the trade mark therein registered for class 38, and numbered 7124, or for such other order as the Court may see fit. The evidence, in my opinion, establishes that in 1883 a firm of manufacturers in England, styled Footman, Pretty & Nicholson, of which the applicant is the ultimate successor, was, and had been for a great many years carrying on the manufacture of corsets

(*h*) [1902] 2 Ch. 1.
(*i*) 17 R.P.C. 689.
(*k*) [1885] 32 Ch. D. 247.
(*l*) [1889] 45 Ch. D. 519.
(*m*) [1876] 3 Ch. D. 659.
(*n*) 8 R.P.C. 181.
(*o*) [1900] 2 Ch. 218.
(*p*) [1900] 1 Ch. 114.
(*q*) [1886] 32 Ch. D. 311, at p. 321.
(*r*) [1898] A.C. 571.
(*s*) 3 R.P.C. 164.
(*t*) [1892] 2 Ch. 301; 9 R.P.C. 189
(*u*) [1901] 1 Ch. 382.
(*v*) 19 R.P.C. 261.
(*w*) [1891] 2 Ch. 402.
(*x*) [1893] 2 Ch. 262; 10 R.P.C. 269.
(*y*) 15 R.P.C. 169.
(*z*) 12 R.P.C. 25.
(*a*) [1894] 2 Ch. 115.
(*b*) [1902] 1 Ch. 125.
(*c*) 8 R.P.C. 69.
(*d*) [1902] 1 Ch. 758.
(*e*) [1887] 13 V.L.R. 752.
(*f*) [1891] 17 V.L.R. 736.
(*g*) [1897] 18 A.L.T. 183.
(*h*) [1897] 22 V.L.R. 636.
(*i*) [1889] 42 Ch. D. 274.

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there; and prior to the year above mentioned a firm of persons called Warner Brothers, carrying on business in New York, in America, as corset manufacturers and dealers in a large way, had procured the applicant's predecessor to manufacture corsets for them to a large number.

In 1883 Warner Brothers desired that Footman, Pretty & Nicholson would stamp the corsets which they made for them with the initials of the latter firm, "W.B.," and would also cause labels to be affixed to the boxes containing such corsets on which the letters W.B. should be conspicuous. Footman, Pretty & Nicholson obeyed these instructions, and designs were accordingly prepared, and were continuously used on the boxes containing all corsets thereafter sent by Footman, Pretty & Nicholson to Warner Brothers.

Certain tariff duties levied in America on imported corsets caused Footman, Pretty & Nicholson, about July 1886, to discontinue dealing in those articles with Warner Brothers. The corsets which had been manufactured as described and labelled with "W.B." became popular and well known, and in October 1884 Footman, Pretty & Nicholson duly registered in England, as their labels, the two labels above mentioned. They also then registered there W.B. (over diamond) as another of their trade marks, and they also registered there some other trade marks as to various articles of their manufacture in which the letters W.B. were a conspicuous and universal feature.

All these trade marks duly became the property of the original firm's successors until they passed to the applicant company by proper assignment, and all have been renewed from time to time on the register as required.

In America the respondents Weingarten Brothers have carried on the manufacture and sale of corsets for many years, and they have also adopted the letters W.B., which are the initial letters of their firm name, as conspicuous features of their trade marks and labels as registered in America, and they have established a large trade in the articles of their manufacture.

Howsoever it came about, and for whatever reason, whether because of the fame and popularity of the applicant's goods, or that of the respondents' goods, I think it clear, beyond reasonable

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controversy, that the letters W.B. have become eminently desirable to both these manufacturers as a symbol of great attractiveness and value in connection with corsets.

They have been used, as I have said, universally as a feature of all the applicants' labels and trade marks in England. However else their labels or trade marks varied, the W.B. was always present as a feature of them, and it was stamped on the corset itself. The respondent made similar conspicuous and general use of these letters in America in respect of their goods.

In May or June 1901 it came to the knowledge of the applicant firm in London that several firms of dealers in corsets in that city were selling corsets of the respondents' make, in boxes bearing the letters "W.B." on their labels, and having "W.B." stamped on the corsets themselves. The applicant forthwith warned those firms that they were infringing its trade mark thereby, and they informed the respondents, whereupon the latter withdrew all boxes having "W.B." upon them from sale in London, and caused the "W.B." which had been stamped upon the corsets to be obliterated, and from that time onward no goods of the respondents' manufacture, or of the manufacture of anyone else than the applicant, have been sold in England on which, or on the boxes containing which, "W.B." has appeared.

Very soon after this occurrence the respondents took steps to register a trade mark in the several States of Australia. In Victoria they lodged their application on the 2nd August 1901, and this fact having come to the knowledge of the applicant firm, it, too, in September 1901, and in March 1902, lodged applications in each of those States to have its trade mark, W.B. (over diamond), registered.

The respondents obtained registration of their marks on 2nd August 1901. In October 1902 the respondents commenced an action in Melbourne against a firm, Paterson, Laing & Bruce, who had been agents there for the sale of the applicant firm's corsets, and had dealt in the sale of them there for some time before. This firm entered an appearance to the action, and the respondents then discontinued and paid the defendants their costs.

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The respondents continued to sell their goods in Victoria bearing the trade mark (registered) in that State; and on 1st May 1903 notice of the present motion was served upon them. The applicant bases its claim to interfere on two grounds:—(*a*) That since the year 1885 its corsets stamped with W.B., and contained in boxes bearing their labels, had been sold in considerable numbers in Melbourne and in other places in Victoria, and that such corsets had become well known there by the mark W.B. (*b*) That in any case the letters W.B., as applied to corsets, were "common to the trade."

In my opinion the evidence in support of (*a*) is by no means strong. It has been shown that in 1885 Messrs. Paterson, Laing & Bruce purchased from the applicants' predecessors 576 pairs of corsets, which bore these letters "W.B.," in boxes bearing their labels. These corsets were sold in Victoria. After that none were obtained by Paterson, Laing & Bruce until 1895, when they bought another parcel of 715 pairs, which were similarly sold. Thence until 1901 no more were purchased by them, and then 22 pairs only were so purchased. And then in 1902, when the contest of the trade marks had arisen, and both parties were pressing their goods, Paterson, Laing & Bruce purchased 5,407 pairs for sale in Victoria.

From 1893 to 1902 it is shown that a far larger number of these corsets, bearing the applicants' trade mark and labels, were introduced into the States of New South Wales and South Australia, and were sold there to the extent of over 60,000 and 31,000 respectively, and it has been suggested that many of these may have been resold in Victoria. There is no evidence, however, of that fact, and the sales in Victoria are those which are important. No retail sellers or purchasers of the corsets have been called to show that they observed the W.B., or that they attached any meaning or importance to it, nor is any reason given to explain why such persons have not been called. Mr. Bruce's evidence and that of his salesman, Mr. Wellington, is very obscure and uncertain as to what the W.B. really meant, or as to how far it was or was not accepted as specially indicative of the applicants' manufacture. Slight evidence of this fact would be sufficient for the present purpose if it were clear and distinct—*Goodwin* v.

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The Ivory Soap Co. (*k*)—but that which we have is neither, and I do not think that the applicant has made out this special qualification to object to the respondents' registration. The facts on this point here are by no means so well established as those in the case cited. The applicant's other ground (*b*) is, however, sufficient to entitle him to claim that the respondents' registration is illegal, because it is such a trade mark as is apt to embarrass the applicant in the sale of its goods, or in the use of its trade mark, and is one which, if not legally registered, the applicant may well have an interest, and a right to strike off the register.

The applicant objects, in the first place, that the trade mark of the respondents as registered is not a distinctive "device," "label," or "ticket" (it certainly is not, nor contains, any other of the essential particulars enumerated in sec. 8 of the *Trade Marks Act* 1890 No. 2), and therefore he contends that it is improperly registered as a trade mark. In my opinion the mark is not "distinctive" within the meaning of the Act. Its whole and scarcely disguised purpose is to secure the use of the important letters "W.B.," and in order to do this a colourable device is constructed, of which those letters are the leading and only attractive part. They are surrounded by a conventional wreath of bays, at the top of which is a scarcely intelligible something, which is said to be a shield, on which are emblazoned stars and stripes; not the stars and stripes of the American Union, but a fanciful collection of stars and stripes. Being told that it is a shield, one can believe it to be so. The naked eye cannot discern any stars, though stripes are observable upon it, and even the use of a magnifying glass does not for a moment suggest a glimpse of the firmament. Indeed, thus scrutinized, the upper part of the shield would convey to one, possibly a flight of bees, but more efficiently splashes of ill-applied whitewash on the upper rail of a paling fence. There is not the least attempt to construct an artistic, or suggestive, or peculiar device in which the letters might play a structural part.

The whole thing is a contrivance, I would say, to make "W.B." prominent and attractive, in the midst of insignificant commonplace. If those letters had been in the middle of a mere recti-

(*k*) 17 Rep. Pat. Cas. 689.

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lineal figure as a border, or of a circle of dots, they could not be more impressive, and the whole device, as such, less distinctive than the registered device is. This trade mark is, I think, quite within the exception which Romer, L.J., makes in his final observations in *In re Clement et Cie.'s Trade Mark* (*l*). That this was the intention which the respondent had in view in constructing this "device" or "label" is manifested pretty plainly by his application to register it, which was lodged in South Australia, and which is in evidence as an extract from the *Government Gazette* of that State. In it the respondents state—"The essential particular of the above trade mark is the letters W.B., and the applicants disclaim any right to the exclusive use of the added matter."

Besides, one look at the respondents' several labels, the exhibit, shows the paramount desire to make "W.B." prominent at the expense of all else, which makes the purpose of the trade mark as registered all the more plain. If the applicant is in a position to complain of this, as it seems to me, disregard of the central requirements of the Act, it would, I think, be entitled to succeed. The applicant is in the same line of business as the respondents. It has in England had an exclusive use of these letters W.B., as applied to corsets, in fact. It has stoutly contested its right to them as against the respondents and with success. It is contending with the respondents in Victoria for the sale of its corsets as against theirs here, and if this trade mark remains on the register the applicant's trade in them may well be embarrassed by its seeming to represent that the respondents have an exclusive right to the W.B., though in point of law they have not. In these circumstances the decision in *Re Apollinaris Co.'s Trade Mark* (*m*), as extended by *Re Powell's Trade Mark* (*n*), appears to me to sustain the applicant's claim to interfere to have the trade mark removed from the register.

The applicant's next objection is that the respondents have included these letters "W.B.," which are, at all events, "common to the trade," in what they claim to be a distinctive device or label; that they are "added matter," within the meaning of the

(*l*) [1900] 1 Ch., at p. 121. (*m*) [1891] 1 Ch. 186.
(*n*) [1893] 2 Ch. 388.

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Trade Marks Act 1890 (No. 2), sec. 8, sub-sec. (2), and that therefore the respondent should have disclaimed, in his application to be registered, any right to the exclusive use of such "added matter," and that having neglected to do so (as they in fact have done), their registration is bad. I do not know any array of cases so confusing and so difficult to follow as those which treat of this aspect of trade mark law. If, however, one looks at the English Statutes of 1875, 1883, and 1888, successively, and also looks to *Re Clement et Cie.'s Trade Mark* (*o*), which is a decision of the Court of Appeal, one arrives at what appears to me to be the true key to the interpretation of the words "added matter" as used in those Statutes, and therefore as used in our Statute, which is a copy, to this extent, of the English Act of 1888.

Much difficulty has arisen apparently by supposing that "added matter" means among other things "letters" or "words," etc., which have been used to form part of a combination with some thing else to construct a distinctive "device," "label," etc., which whole is registered as a trade mark, and which having been so added to that something else are now required to be disclaimed as things which, apart from their combination with those other things, could not be lawfully registered at all as a trade mark so as to give the person registering a right to an exclusive use of them.

This is, I think, wrong, and to the right understanding of what is "added matter" *Re Clement et Cie.'s Trade Mark* (*supra*) is a valuable aid.

The Legislature, through all the Acts, aims to define what may be a trade mark, and how it may be constructed, but when a trade mark has been arrived at in accordance with the Act, it and every part of it is absolute, and never needed and does not need now, any disclaimer.

Any trade mark to be soundly registrable must be "distinctive," that is it must have the quality of rendering goods of the proprietor's manufacture as distinguished from that of other manufacturers recognizable by its presence upon them.

It must also include at least one of the particulars which all the Acts have styled "essential," and which are found, as now pre-

(*o*) [1900] 1 Ch. Div. 114.

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scribed, in sec. 8, sub-sec. (1) of our *Trade Marks Act* 1890 (No. 2). Without consisting of or including one or more of these essential particulars it cannot be a lawful trade mark. These essential particulars are some of them, for example, those mentioned in sub-secs. (*a*), (*b*), (*c*), (*d*), and (*e*), self-contained; they consist of, and can only be, themselves alone. They or either of them may be a trade mark alone or they or either of them may be compounded with one another or with (*c*) to make up a trade mark, but none of them can individually be varied as to construction.

Those particulars enumerated in (*c*), however, have no prescribed individuality; each of them may be constructed in any way provided it is always distinctive. Some of them are described as if their method of attachment to the goods was to be their characteristic (*e.g.* "label," "ticket)," but that is not what is intended. Each is indicated as the vehicle of the trade mark, not as the trade mark itself. A "device," or a "label," for instance, may consist of some figured representation strikingly regular, ornate, or grotesque, so as to be "distinctive."

Ordinary letters, or words, are never in themselves distinctive, in the legal sense important here, because they are the right and indeed the necessity of everyone to use, and yet they may be utilized to form part of a combination of things which shall have the effect, taken altogether, of constructing a distinctive device, or label, as the case may be. Unless they are so combined as to substantially make their character as mere letters or words subservient to their participation in making a striking distinctive attraction for the eye, as part of a design, their use would be colourable, and evasive, only, and they would remain mere letters or words, and the claim that they constituted a trade mark would be rejected.

Where letters or words are properly used in combination as I have described, they are in truth added matter, which could not be used alone at all, but they are added to things which are legally distinctive to make with them a whole distinctive device or label. (I still use these instances only to avoid enumerating every one of the things included in sub-sec. (*c*).) Such an addition however, is not the "added matter" which the Statute requires to be disclaimed.

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Being once included in the distinctive whole the *tout ensemble* constitutes a "trade mark," and as such that mark needs no apology, explanation, or disclaimer. But the Statute by sec. 8 sub-sec. (2) allows the proprietor of a trade mark to add to it when and where he uses that trade mark, "any letters, words, or figures, or combination of any letters, words, or figures, or of any of them," but the applicant must in that case, in his application for registration, state the essential particulars of the "trade mark" and must disclaim any right to the exclusive use of the added matter; that is, he must state what of the whole proposed registration, whether the "device" or "label," etc., alone, however compounded, or that together with the additional "letters, words, or figures," etc., which he chooses under the leave of sub-sec. (2) to superadd, he insists on using as his trade mark, so that other people may know what he claims to use exclusively, and what not; and he must expressly disclaim what he does not claim to use exclusively. His trade mark, however compounded, under sub-sec. (1) he of course claims exclusively, but if he chooses to add something to it under sub-sec. (2) he must inform the world what, if any, part of the latter he claims to use exclusively; and the method of doing this which the Statute prescribes is to define expressly what are the "essential particulars," of his trade mark, *e.g.*, he would say, "I claim a copy of my written signature" or "a combination of my written signature together with the device, which is itself a combination, of two nymphs leaning behind, and upon the ornamental monogram W.B.," or whatever else the "device" was; and he would then disclaim the right to the exclusive use of all else.

This seems to be clearly the effect of *Re Clement et Cie.'s Trade Mark* (*p*). In *Re Hudson's Trade Mark* (*q*); and in *Re Atkin's Trade Mark* (*r*), the Court of Appeal, Cotton, Bowen, and Fry, L.JJ., express an opinion to the contrary of this, and indicate that, in the case of a registration under the English Act of 1883, anything which was "common to the trade," which was made use of in compounding the distinctive trade mark under sec. 64

(*p*) [1900] 1 Ch. 114.
(*q*) 13 R.P.C., and in 32 Ch. D., at p. 322.
(*r*) 3 R.P.C. 164

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of that Act, would have to be disclaimed as being "added matter," as well as anything which was an addition to the trade mark itself, such as is shown in *Clement et Cie.'s Case*. In those cases, however, the Court had only to decide whether or not any disclaimer was required under the Act of 1883 in respect of a trade mark which had been registered under the Act of 1875, which Act did not provide for any disclaimer; and its interpretation of the disclaimer sections of the Act of 1883 was not necessary to the decision.

Any opinion, however, expressed by the learned Judges who composed that Court would, even though *obiter*, be entitled to great respect, but in *Re Apollinaris Co.'s Trade Mark* (*s*), two of them forming part of the Appeal Court have expressed an opinion which is to the contrary of that given in the cases above cited, and which is in accordance with the view in *Re Clement et Cie.'s Trade Mark* (*supra*).

Again, in *Re Coleman's Trade Mark* (*t*), Kekewich, J., seems to have assumed that the Act of 1888 imposed the obligation on the applicant for a trade mark to disclaim the exclusive use of a part of a combination which made up a "device" or "label," which he did not claim as an essential part of the trade mark, and that such part, though part of the trade mark itself, was "matter added to it." The case is but little helpful here, because it dictated a price for an indulgence allowed by the Court rather than decided anything definitely. The whole judgment is very guarded, either as to assuming that there was any real necessity for the application, or as to closely interpreting sec. 10 of the Act of 1888.

In *Burland* v. *Broxburn Oil Company, etc.* (*u*) Chitty, J., had to interpret the Act of 1883, secs. 64 and 74. He expressly laid the Act of 1888 aside as being subsequent legislation. His decision has been cited to us as an authority for the proposition that the view in *Clement et Cie.'s Trade Mark* is not correct. There are some remarks in His Lordship's judgment which seem to indicate a contrary view, but what he was deciding was another matter altogether. A trade mark was constructed of "a written signa-

(*s*) [1891] 2 Ch. 186, at p. 233. (*t*) [1891] 2 Ch. 402.
(*u*) [1889]42 Ch. D. 274.

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ture," one of the essential particulars prescribed by sec. 64, sub-sec. (1), and of the word "Washerine" which was so used under the supposition that it was a "distinctive word" within the meaning of sec. 74, sub-sec. (*a*). It was found by the learned Judge that "Washerine" was not a "distinctive word," and therefore was not within sec. 74, which was the only provision as to disclaimer before the 1888 Act, and it required disclaimer of "distinctive" words only. It was not a part of a "device" or "label" under sub-sec. (*c*), but was a mere addition of a word in some way "distinctive" to a sufficient trade mark, a written signature. This case was cited to the Court in *In re Clement et Cie.'s Trade Mark* (*supra*). Again, in *In re The Smokeless Powder Company's Trade Mark* (*v*), the same learned Judge took a similar view. This case was also cited as an authority opposed to the view taken in *Re Clements et Cie.'s Trade Mark* (*supra*), but the decision is in effect similar to that in *Burland* v. *Broxburn, etc., Company*, that the registration was under sec. 64 of the Act of 1883, and the words "Smokeless Powder" included in the registered trade mark were not "distinctive words" within sec. 74 of that Act, and therefore needed not to be disclaimed, because it was only as to "distinctive words" any disclaimer was required, or was possible, under that Act.

Indeed, Chitty, J., in this case, himself cites the opinion of Lord Esher in *Pinto* v. *Badman* (*w*), that "the truth is the label does not consist of each particular part of it, but consists of the combination of them all," and he approves of it; and this is the principle on which *Clement et Cie.'s Case* rests. Hence so far as this case applies at all it supports that authority.

We were also referred to *Re Wright, Crossley & Co.'s Application* (*x*), but anything said in it was clearly *obiter* to the present question and it would be overborne by the decision of the Court of Appeal in *Re Clement et Cie.'s Trade Mark* (*supra*) if it was inconsistent with it.

Finally the case of *Re Player's Trade Mark* (*y*) was cited for the applicant on this point. It does not seem to me to conflict in any way with *Re Clement et Cie.'s Trade Mark* (*supra*), and,

(*v*) [1892] 1 Ch. 590.
(*w*) 8 R.P.C. 181.
(*x*) [1900] 2 Ch. 218.
(*y*) [1901] 1 Ch. 382.

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as it was decided over a year after it, that case would have been at least cited and considered if it had anything to do with the matter which Cozens-Hardy, J., was dealing with.

In this State the judgment of Hodges, J., in *Mitchell* v. *Joshua* (z), especially at p. 472, is quite in the same direction as that taken later in *Re Clement et Cie.'s Trade Mark* (*supra*), though for the reason which His Honor expresses the conditions did not then exist in the Statute by which the full question dealt with in the latter case could have been considered in the former, if it had been necessary to consider it. For all these reasons *Re Clement et Cie.'s Trade Mark* is, in my opinion, the correct exposition of the meaning of these Statutes; and it is also the latest expression of the view of the Court of Appeal in England on the direct point in issue in this case. The applicant in my opinion fails on this particular argument.

The respondent's counsel urged that certain representations on the applicant's own labels were deceptive, and possibly fraudulently so; and that therefore it ought not to be permitted to succeed in establishing any right founded on them.

We are not called on to express any opinion on this point. The view we take disposes of the contention of the applicant which is founded on any right of it to interfere with the respondent's registered mark because its business, alleged to have been attracted in Victoria by the notoriety of its labels or trade marks, is likely to be injuriously affected by such registered mark, against the applicant. Therefore any retort by the respondent that the applicant's labels are deceitful or fraudulent becomes unimportant. The respondents also contended that if the applicant were otherwise entitled to interfere to rectify the register it has applied too late. They rely on the well-established principle that promptitude is always demanded in these cases. We think, however, that in the present instance the applicant cannot fairly be said to have unreasonably delayed. The respondents knew perfectly well that the applicant was entitled to a trade mark in England, which included these letters W.B. as a part of it, and that they had endeavoured there to use the same letters conspicuously on their corsets, and that the applicant had there defeated this attempt.

(z) 17 V.L.R. 736.

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When the respondents sought to register the trade mark in question in Victoria, the applicant at once sought to register its English trade mark here also, and at once commenced to push its goods in Victoria bearing that mark. When the respondents succeeded in getting on the register they threatened an action against the applicant's agents in Victoria for using its trade mark here. This was resisted, and the respondents at once gave up their action, and paid the agent's costs. All this shows clearly that the respondents knew perfectly well that the applicant was contesting its attempt to secure the W.B. in Victoria, and they were certainly not induced to suppose that if they registered them they would be permitted to go unquestioned, and they chose to take the risk.

Rivals in such matters are expected, where both are in the same country, to lose no time in manifesting any opposition by the one to the other who attempts registration, and, indeed, that principle prevails in all cases. Where, however, as in the present case, the parties are at opposite ends of the earth, a more liberal allowance ought to be made as to what is reasonable promptitude, and we think that, in all the circumstances, the interval between the respondents' registration and this application has not been too long; and that no inconvenience has been occasioned to the respondents by such lapse of time as has in fact occurred which they did not know full well they must encounter.

Our view is, finally, that the registered trade mark of the respondent is not distinctive, but is only colourable. And we therefore consider that the Register of Trade Marks should be rectified by removing it from that register.

Though the applicant succeeds, by far the larger part of the evidence, and of the argument, was directed to the points of the case as to which it fails. Indeed, so much as was necessary to support the point which has proved successful is relatively minute. For this reason we think that each party should abide its own costs.

A'BECKETT, J. I agree that the order just pronounced is that which should be made in this case. I have felt the greatest difficulty in considering what authorities should govern it, and cannot say that I have arrived at my decision without doubt.

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To me the statute law on the subject we have to deal with is most obscure, and the cases decided upon it throw no clear light I agree with the Chief Justice that no array of cases is so confusing and so difficult to follow. In applying the *Trade Marks Acts* to the infinitely varying absurdities of devices, designs, words, and letters used to distinguish goods, English Judges have arrived at differing results, the current of decision setting first in one direction, and then in another. This is shown by comments on the conflicting decision at pages 154 and 155 of *Kerly on Trade Marks* (2nd ed.), and the note in which the eminent specialist in this branch of the law diffidently observes, on his attempt to define it, that "it is submitted that this statement of the law is in accordance with and follows from the decision of the Court of Appeal in *Clement's Case*." The reasons which lead me to concur in the result worked out by my colleagues may be shortly stated. I think that the registration of the label here is the registration of the letters "W.B.," and falls within the prohibition expressed by Romer, L.J., in *Clement's Case*, in saying that "the registration of words which in themselves would not constitute a proper trade mark would not be sanctioned merely because some flourishes were colourably placed round them with the view of making out a distinctive or compound label when in fact what was really intended to be registered was the words alone." Substituting "letters" for words, that pronouncement seems to me to apply to Weingarten's registration. I think that the applicants have shown to the Court sufficient interest in the letters W.B. to entitle them to object to the registration of those letters. It has been contended for Weingarten Brothers that in the form in which their registration has been effected, no rights of the applicants with regard to those letters would be endangered and that Weingarten Brothers would not be armed with any new powers against them—that this or that specified defence would be available for them if they were attacked. In the uncertain condition of the law I am not satisfied that these defences would be available. I think that the retention of Weingarten's trade mark on the register would subject them to new risks of litigation from which which they are entitled to be protected, and that for this and other reasons the mark should be removed.

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HODGES, J. This matter comes before the Court on a motion by Pretty and Sons Limited to expunge a trade mark that has been registered by Weingarten Brothers in respect of corsets. The trade mark that has been registered consists of a wreath with a shield on which there is something like stars and stripes, and in the centre of the wreath the letters W.B.

Counsel for Pretty and Sons ask that this mark should be removed from the register because it is not a distinguishing mark, because apart from the question of any other marks this one does not possess any characteristic which would enable a person to select goods by reason of this mark being on them. But using my eyes on this mark alone, without considering other marks, it seems to me to be quite sufficient to distinguish goods from other goods which do not bear this mark upon them or which have a totally different mark.

Counsel next earnestly and stoutly argued that this trade mark was bad because there had not been a disclaimer of the letters W.B. The learned counsel argued that as this mark was registered under the *Trade Marks Act* 1890 and as W.B. was not the name of an individual or firm printed, impressed, or woven in any particular or distinctive manner, and as they were not a written signature or copy of a written signature of the firm which applied for registration, and as they were not an invented word or words and not a word or words having no reference to the character or quality of the goods, and as they were not a name of the firm applying for registration or the foreign equivalent thereof, or of its place of business, and as they were not any especial or distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade mark before September 1876, these letters could not form part of the trade mark, but must be regarded as added to an essential particular, and should have been disclaimed as "additional matter" within the meaning of sec. 8, sub-sec. (2). No words or letters (so he argued) or combination of words and letters, etc., can form part of a trade mark unless they come within the provisions of sec. 8, sub-secs. (1) (*a*), (*b*), (*d*), (*e*), or (3) (*a*), (*b*). Any other letters than such as are authorized by those sub-sections are no part of the trade mark,

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and if there be a trade mark without them, that trade mark may be registered, but the letters, etc., must be disclaimed as additions to the trade mark. According to that argument—indeed, it was so expressly contended—no letters, no matter how fantastically joined or arranged, can form part of a distinctive device, or distinctive mark, or distinctive label, or distinctive ticket.

Now, apart from authority, it is difficult to understand why letters may not form part of a distinctive device, etc. It seems to me that the effectiveness and the distinctive character of a label, etc., may be greatly aided by a fantastic or a skilfully arranged monogram, and there seems no reason why such latitude should not be allowed to persons honestly desirous to distinguish their goods from those of other people. There would be very strong reason against this if it gave the owner of the trade mark any exclusive right to use the letters, but none such would be acquired. A person does not obtain the exclusive right to use each part of his trade mark—it is his trade mark, the whole of it—that he has the exclusive right to use, and the right to prevent persons using it or colourable imitations of it. And even if Weingarten Brothers maintain their position here it does not give them the exclusive right to use the letters W.B.

All the world are still at liberty to use those letters. Apart from authority, therefore, I should feel no doubt that letters might form part of a distinctive device, etc. I turn, therefore, to the authorities. In *Clement's Case* (*a*), Clement et Cie. had registered as a trade mark a label consisting of two parts; the upper part consisting of a rectangular device, and across this device was written "St. Raphael." Another company applied for the rectification of the register by the removal of that mark, or by "adding to the entry thereon of the said mark a disclaimer of any right on the part of Clement et Cie." to the exclusive use of the words "St. Raphael." On the one side it was argued that these words were an "addition" to the mark, on the other that they were part of the mark itself, part of the distinctive label, and not an addition to it. The case went to the Court of Appeal. That Court decided that they were part of the distinctive label—part of the mark. Lindley, M.R., in giving judgment says (at p. 120):

(*a*) [1900] 1 Ch., p. 114.

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—"Mr. Sebastian has brushed away a good deal of the dust which was raised by the ingenious arguments of the appellant's counsel, by pointing out that the respondents are not claiming to be the registered owners of the words 'St. Raphael' or of any fancy name, or, indeed, of anything except the label which they have registered. They were entitled under sec. 64 to register a 'label' as a trade mark, and I think the learned Judge was quite right in treating the words 'St. Raphael' not as an 'addition' to but as part of the mark. Those words form part of the label—the thing which is registered—and there is no reason, therefore, for calling upon the registered owner to disclaim them under sec. 74. That section applies to additions to, not to parts of, a registered mark or label. I have no hesitation in saying that the words 'St. Raphael' are evidently part of the registered label and not an addition to it."

In this Sir J. H. Jeune and Romer, L.J., concur, the latter adding—"The upper label registered by the respondents was in my opinion in itself a perfect label, and the words 'St. Raphael' are not an addition to it, but form part of it." That is a decision of the Court of Appeal, and if that decision is right letters might form part of a distinctive device or label, etc., under the English Act of 1883, as in that case it was held that the letters making up "St. Raphael" did form part of that distinctive label. And, looking at the trade mark in this case, I have no doubt that W.B. form part of the distinctive device, or label, or ticket. It was, however, contended that our Act corresponds with the English Act of 1888; that the law has, in this respect, been fundamentally altered by the alteration in sec. 64 of that Act.

It was argued that since sec. 10 (2) of the Act of 1888 has taken the place of sec. 64 (2) of the Act of 1883, letters or words, etc., cannot form part of the essential particulars enumerated in sec. 10 (I) (*c*) of the Act of 1888. Sec. 64 (2) provides—"There may be added to any one or more of these particulars any letters words or figures or combination of letters words or figures or of any of them."

Sec. 10 (2) provides—"There may be added to any one or more of the essential particulars mentioned in this section any letters words or figures or combination of letters words or figures

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or of any of them but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark and must disclaim in his application any right to the exclusive use of the added matter and a copy of the statement and disclaimer shall be entered on the register."

But so far as this question is concerned the only difference between the two Acts is that the latter has given a power, and made it a duty, to disclaim added matter. In each section power is given to "add" to the "essential particulars" letters or words; in the latter section there is also imposed the duty of disclaiming added matter, and this is absent from the earlier section. But in *Clement's Case* the Court decided that the words "St. Raphael" were not added matter but were part of the "distinctive label." And I can see no reason for supposing that the Legislature meant to alter the meaning of the words "distinctive device mark," etc.

To put this another way: *Clement's Case* decided that the letters "St. Raphael" formed part of an essential particular under sec. 64 (*c*), and were not an addition to an essential particular. If there had been in that Act a section making it the duty of persons applying for registration to disclaim all "additions" to an essential particular, the applicants could not have been required to disclaim "St. Raphael," because it was part of the essential particular, and not an addition to it. And it can make no difference that the duty of disclaimer is imposed, not by the same Act but by an amending one. A man cannot be required to disclaim that which is part of his essential particular, his distinctive device, etc.

It was next argued that this was substantially a registration of W.B., that outside W.B. there was no substance in the trade mark. On this question I have felt much difficulty, and the case comes very near the dividing line. But in my opinion, in the wreath and the shield with its alleged stars and stripes, there is not enough to save this from being an attempt to procure the registration of letters which in themselves would not constitute a proper trade mark by placing a few flourishes round them so as to make colourably the appearance of a compound label. In fact all that Weingarten Brothers really wanted was the exclusive right to the letters: See Romer, L.J. ([1900] 1 Ch., p. 121). On this point

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of the case I have felt and still feel much doubt, though I am somewhat strengthened in the conclusion by an examination of exhibit A. to the affidavit of Julius Weidenbach. In those samples of Weingarten Brothers' labels the W.B. is the essential feature and in the one that bears the trade mark the trade mark is most insignificant: what stands out is the W.B. And in an application in another State the W.B. is claimed as the essential feature and the exclusive use of the wreath is disclaimed. This shows that their object in another State was to secure the exclusive right to W.B., and I think that that is their object here, and for that reason the application should be granted, and the mark expunged from the register.

It was next argued that this mark was like a mark used by Pretty and Sons on corsets in this market before the registration of this trade mark, but I do not see the slightest resemblance between this mark and the label or brand of the defendants. Having looked at the two marks, I do not think it in the slightest degree probable that a person who has purchased goods with Pretty and Sons' label attached would afterwards take goods with Weingarten Brothers' trade mark on them in the belief that they were getting Pretty and Sons' goods. No doubt W.B. is used in both cases, but the W.B. enclosed in a circular wreath with its shield, etc., is utterly unlike Pretty and Sons' label of W.B. in a large rectangular frame.

Counsel next argued that before September, 1901, when Weingarten Brothers registered the trade mark, Pretty and Sons' corsets were known in Victoria, and bought and sold as W.B. corsets, that W.B. was their trade designation. The agents for these corsets in Victoria were, first, the firm of Paterson, Laing & Bruce, and afterwards Paterson, Laing and Bruce Limited. And G. W. Bruce undoubtedly says in his evidence that from 1885 to 1901–1902 Pretty's corsets were known in the market as W.B., and none others were. But it is impossible to attach any value to this witness's evidence. He first swore that the first shipment the firm had of these goods was 5,000 or 6,000 pairs, then at least 24 to 30 dozen; then that he did not know the meaning of paragraphs in his own affidavit; then, though he had sworn that Pretty's corsets, and Pretty's only, were known in the trade as W.B., in

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cross-examination he admitted that he never sold one, and could not legally swear under what name they were sold, but would swear all the same. It is useless to examine this witness's evidence any further—it is full of contradictions, and utterly untrustworthy. The evidence of Mr. Wellington, the manager of the corset department of Paterson, Laing & Bruce since 1894, was also relied on. He in his affidavit has sworn that these corsets of the applicants were known to the trade and the public and were sold as W.B. corsets, and that up to 1901 a demand for a W.B. corset was a demand for a corset of the applicants' manufacture. This gentleman was cross-examined on his affidavit and re-examined. He was perfectly calm, collected, self-possessed. He repeatedly asserted that W.B. in reference to corsets had no meaning, was utterly insensible, had no reference to manufacturer or anyone else, and on being asked by the Court whether those letters did not refer to the manufacturer said most positively "No," and on being further asked by the Court whether they did not either refer to the manufacturer or the selector of the goods answered "No; they have no meaning."

It is significant that after the adjournment, and not until after the adjournment, he asked to be allowed to withdraw that statement. I do not think it profitable to further criticise this class of evidence. And looking at the evidence of William Tertius Pretty, that up to the end of 1891 he had sold to Paterson, Laing & Bruce 576 pairs of corsets in 1885, 715 pairs in 1895, and 22 pairs in 1901, and bearing in mind that no single purchaser of these goods in Victoria, not a single retail dealer, was called to say that he purchased these goods as W.B., or ordered them as W.B., or had them invoiced to him as W.B., or knew them as W.B., and that not a single order from any person, and not a single invoice to any person was produced, I am unable to believe that these corsets were known to the public or to the trade as W.B. corsets. A fire may account for something, but it cannot account for all the above, and therefore, while I think that the application should be granted, on the ground that this is an attempt to register W.B., I think that the application should be granted without costs, as so much of the expense has been incurred over this question.

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On the question of delay I have nothing to add to what has been said by the Chief Justice.

Order accordingly.

Solicitors for applicant: *Waters & Crespin.*
Solicitors for respondents: *Blake & Riggall.*

J. M.

[1904 October 27.]

[IN THE HIGH COURT OF AUSTRALIA.]

MARSHALL *v.* THE COLONIAL BANK OF AUSTRALASIA LTD.

Banker and customer—Cheque, fraudulent alteration of—Negligence of customer in filling up cheque.

A cheque was drawn by one of three executors in such a way as to permit of the spaces left in the cheque being filled up. The cheque in this form was signed by all the executors, and the executor who had thus drawn the cheque subsequently filled in the spaces with letters and figures for a far larger sum than the amount of the cheque as presented to the other two executors for their signature, and the banker paid the same, and the first executor misappropriated the amount representing the altered cheque.

In an action by the other two executors to recover the extra amount of the cheque thus fraudulently altered,

Held, that the plaintiffs could not recover.

Per HODGES, J. That the contract between a banker and his customer is, that while the banker undertakes to honour the cheques of his customer, the latter on his part undertakes that he will not, by the method of drawing such cheques, give facilities for their alteration, or that the customer undertakes that if the banker is misled by his fault in the manner of filling up the cheques the loss shall fall upon the customer.

Per HOOD, J. The customer of a bank undertakes that he will not draw his cheques in such an unusual way as to afford facilities for fraud, and if he does so he must bear the loss.

Young v. *Grote* ([1827] 4 Bing. 253) followed.

THIS case (the headnote of which is set out above), reported *ante*, p. 804, was reversed on appeal by the High Court of Australia [GRIFFITHS, C.J., BARTON and O'CONNOR, J.J.], on the 27th day of October A.D. 1904.

Starke and *Coldham* for the appellants.

Bryant and *Schutt* for the respondents.

Judgment reversed.

Solicitor for appellants: *C. J. McFarlane.*
Solicitors for respondents: *Moule, Hamilton & Kiddle.*

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WEBSTER *v.* SHAW *and Another.*

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August 12, 15,
September 2.

"*Rules of the Supreme Court* 1884"—*Order XVI., r.* 5; *Order XVIII., r.* 1—*Practice—Misjoinder of causes of action—Several defendants.*

In equity wherever there is a general common whole cause of suit for the plaintiff he is entitled to bring his suit for the relief attaching to the whole cause of suit. If in such suit other defendants are joined as interested in some only of the matters in such suit it is not a misjoinder to include such defendants as parties to the suit.

Britter v. *Sprigg* ([1900] 26 V.L.R. 65) does not decide that misjoinder of causes of action is universally a ground for general judgment for defendants.

REFERENCE TO THE FULL COURT by Madden, C.J.

The case was stated by Madden, C.J., as follows:—

"In this action the plaintiff, on behalf of himself and all other the life policy holders of the defendant the Australian Alliance Assurance Company (hereinafter called the Alliance Company), sues that company and also the Australasian Insurance Company (hereinafter called the Australasian Company)—

"(1.) To have it declared that the sale by the Alliance Company of certain shares of the capital stock of the Australasian Company, which were, as I have found, the property of the proprietary of the Alliance Company on the 14th October 1884, to the life branch of that company on that date, for the price or sum of 31,834*l.* 2*s.* 10*d.*, which price or sum was paid out of the life assurance fund of the said life branch, was fraudulent as against the life policy holders of that branch, and to have the Alliance Company ordered to reinstate the said sum in the said fund.

"(2.) To have it declared, as against the said defendants, that a certain payment made on the said 14th October 1884, by the Alliance Company out of the said life assurance fund of the sum of 2000*l.* to the Australasian Company was also fraudulent, and to have an order against both defendant companies to repay the said sum to the said fund.

"(3.) To have it declared in the alternative that the said life assurance fund was subject to a trust created by the Act No. 474, and that the transactions (1) and (2) were breaches of the said trust, and to have it ordered that the defendant the Alliance Company should make good both the said sums of 31,834*l.* 2*s.* 10*d.*

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and 2000*l.* to the said life assurance fund, and that the defendant the Australasian Company should be ordered also to make good the said sum of 2000*l.* to the said fund as having been received with notice of the said trust and without consideration.

"(4.) The plaintiff also sued in the further alternative to have it declared that having regard to the provisions of the Act No. 474 the said application of the said two sums out of the said life assurance fund was respectively illegal as against the defendant the Alliance Company, and that the receipt of the said sum of 2000*l.* by the defendant, the Australasian Company, was as against it illegal, and to have it ordered that the Alliance Company should make good both the said sums, and that the defendant, the Australasian Company, should make good the said sum of 2000*l.*, to the said life assurance fund.

"I found as to all these several causes of action in favour of the plaintiff.

"(5.) The plaintiff also sued both the said defendants to have it declared that a certain transaction whereby it was agreed that the defendant the Alliance Company should re-insure all the then remaining life risks of the defendant the Australasian Company for a certain sum of money, though all the said risks were very old lives, and the transaction was wholly in the interest of the Australasian Company, and against the interest of the life branch of the Alliance Company, was fraudulent, and ought to be set aside, and he claimed certain orders thereupon as against both the said defendants.

"I found as to this cause of action in favour of the defendants.

"Without entering into details here, the views and charges which were involved in the plaintiff's case as to all these several causes of action made it, in my opinion, necessary that the Australasian Company should be joined as a party to the action apart from the relief sought specifically against it.

"(6.) The plaintiff also sued the defendant the Alliance Company to have alternative declarations made as against that company that one or other distinct set-off transactions, on similar grounds to those on which the several causes of action in clauses (1), (2), (3), and (4) hereof, already mentioned, were alternatively based, were fraudulent, or were breaches of trust, or were illegal, and

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to have certain orders made thereupon against the said defendant company.

"I found all these alternative claims in favour of the plaintiff.

"The defendant the Australasian Company was not in any way connected with any of these alternative aspects of this claim.

"(7.) The plaintiff also sued the defendant the Alliance Company to have it declared as against that company that a certain adjustment of the expenses of managing the several branches of that company was, as against the life policy holders thereof, fraudulent, and to have certain orders made therein.

"I found for the defendant the Alliance Company in respect of this cause of action. The defendant the Australasian Company was not in any way connected with this claim.

"Subject to this reference I found that there was a misjoinder of causes of action, as it appears to me that the causes of action (6) and (7) thereof were misjoined with those numbered (1), (2), (3), (4), and (5), and that while the defendant the Australasian Company was properly joined as a defendant in respect of the latter causes of action, it was not concerned with the former.

"That defendant took no steps by interlocutory proceedings to have the said causes of action separated, or to stay the action, or to have any order made to mitigate the inconvenience of its having to attend that part of the trial at which these causes of action with which it had no concern were being dealt with as provided by Orders XVI. and XVIII. or otherwise.

"Both defendants pleaded the misjoinder as a general defence to the action, and raised it immediately after the opening speech of counsel for the plaintiff at the trial, and also relied on it as a general defence in summing up.

"The further question then arose whether misjoinder of causes of action does, under the law as now existing, entitle the defendants to general judgment in the action.

I have not found any authority for that proposition except that of *Britter* v. *Sprigg* (*a*), which appears to me to affirm it.

"Everything else that I can find seems to make the other way, and I have been brought to doubt, respectfully, whether *Britter* v. *Sprigg*, if, and in so far as, it does affirm the above proposition,

(*a*) 26 V.L.R. 65.

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enough this rule, though apparently of the most material bearing on the point, is not even referred to in the English cases which tell most strongly against the plaintiff. As that rule stands it contemplates the exact position of this case. The mere fact that one defendant is not completely interested in all the causes of action will not necessarily amount to a misjoinder.

Counsel, having referred to *Huon* v. *Dougharty* (*d*), *McLeod* v. *Henty* (*e*), *Montgomery* v. *Blythe* (*f*), was stopped by the Court.

Isaacs, K.C., and *A. H. Davis* (with them *Levinson*) for the defendant the Australian Alliance Company—According to the effect of the decision in *Britter* v. *Sprigg*, the plaintiff is wrong as the case now stands; the question of what the remedy is, is another matter. A plaintiff is not allowed, according to that case, to have separate causes of action against different defendants who are assailed with some but not with others of those causes of action. Here it is openly admitted that as to three specific charges laid in this action the second defendant has nothing to do with them. This case is also covered by the decision in *Smurthwaite* v. *Hannay* (*g*), where the effect of Orders XVI. and XVIII. was fully considered. This is a rule of procedure, and no distinction is now to be drawn between the rules of common law and those of equity. In *Frankenberg* v. *Horseless Carriage Co.* (*h*) it was held that a plaintiff could not join a joint cause of action against three persons with a separate cause of action against one or two of them. Under the old practice this action would have been open to a demurrer for multifariousness: *Daniell's Chancery Practice* (5th ed.), pp. 283, 284. Great injustice is done in cases like this by the admission of evidence which though admissible as against one defendant is wholly unjustifiable as against the other. In the case of the *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* (*i*), it was held that there was no authority, express or implied, in the rules to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. See also *Sadler* v. *Great Western*

(*d*) [1894] 15 A.L.T. 221.
(*e*) [1899] 25 V.L.R. 648.
(*f*) [1900] 26 V.L.R. 24.
(*g*) [1894] A.C. 494, at p. 499.
(*h*) [1900] 1 Q.B. 504.
(*i*) [1895] A.C. 661.

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Railway Co. (*k*). Full notice was given of the objection, and the plaintiff now should make his election as to what he will do, but he cannot be allowed to obtain judgment against both defendants in an action so constituted. We say at present this not a good action; that contention does not destroy the cause of action, but it makes it incumbent upon the plaintiff to put it right. The effect and meaning of Orders XVI. and XVIII. are detailed in *Wilson's Judicature Acts* (4th ed.), p. 243. That seems to point to the conclusion that you cannot join joint causes of action with separate causes of action. See also *Parr* v. *Attorney-General* (*l*); *Turner* v. *Robinson* (*m*). Even if there be identity of parties and identity of subject-matter, a defendant can still complain of multifariousness, and it then becomes a question of discretion.

Counsel referred to the following authorities:—*Salvidge* v. *Hyde* (*n*); *Story on Equity Pleadings*, secs. 530–540; *Roberts* v. *Graham* (*o*); *Mayor of York* v. *Pilkington* (*p*); *Saccharin Corporation Ltd.* v. *Wild* (*q*).

Higgins, K.C., and *Goldsmith* for the defendant the Australasian Insurance Company—This point was raised on the pleadings, and at the inception of the trial, but the second defendant, though quite innocent of all the questions raised in the three distinct charges against the other defendant, has had to incur the expense of being represented during the whole trial. The plaintiff should have been put to his election at the trial. If there is but one trust fund, and that fund has been depleted by a succession of trespasses, you cannot sue every one of the trespassers in one action. You certainly could not do so at equity, and the rules have not altered that old practice. Order XVI., r. 5, was not meant to give a greater laxity to parties than existed under the old system.

Counsel referred to the following cases:—*Pearse* v. *Hewitt* (*r*); *Jerdein* v. *Bright* (*s*); *Bent* v. *Yardley* (*t*); *Marshall* v. *Gilliud* (*u*);

(*k*) [1896] A.C. 450.
(*l*) [1842] 8 Cl. & F., p. 409.
(*m*) [1821] 1 S. & S., p. 313.
(*n*) [1821] Jac., p. 152.
(*o*) [1903] 24 A.L.T. 99.
(*p*) [1737] 1 Atk. 282.
(*q*) [1903] 1 Ch. 410.
(*r*) [1835] 7 Sim. 471.
(*s*) [1861] 30 L.J. Ch., p. 336.
(*t*) [1865] 2 H. & M. 602.
(*u*) [1866] 2 Jur. N.S. 483.

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Aitcheson v. *Kaitangata Railway Co.* (*v*); *Thompson* v. *London County Council* (*w*); *Walters* v. *Green* (*x*); *Williams* v. *Sandy* (*y*); *Robertson* v. *Wealth of Nations* (*z*); *Gray* v. *Stevenson* (*a*); *Burstall* v. *Beyfus* (*b*).

Mitchell, in reply, referred to the following authorities:—*Lund* v. *Blanshard* (*c*); *Daniell's Chancery Practice* (7th ed.), p. 365; *Hamp* v. *Robinson* (*d*); *Inman* v. *Waring* (*e*); *Williams on Executors* (9th ed.), p. 1916; *Cocks* v. *Barker* (*f*).

The judgment of the Court [MADDEN, C.J., HOLROYD, A'BECKETT, and HODGES, JJ.] was delivered by MADDEN, C.J. This case has occasioned some considerable hesitation and discussion, but I think not more than it deserves, both because it is a case of very large interests and also because this rule is one which may very well be restated as a matter of practice and for the guidance of the profession generally. A statement of the effect of the Judicature Rules is made in those cases of very high authority to which we have been referred, viz., *Smurthwaite* v. *Hannay* (*g*); *Frankenberg* v. *Horseless Carriage Co.* (*h*); *Gower* v. *Couldridge* (*i*); *Saddler* v. *Great Western Rly. Co.* (*k*). All those are very definite decisions so far as they go, and so far as the rules with which they purport to deal they are unmistakably clear. They all deal with an objection very like this at a stage before the action came to trial, and they all deal with common law actions, and although common law and equity were fused by the *Judicature Act* in a certain sense, their Lordships insist that for many purposes the distinction between them is as real as it used to be. Order XVI., r. 5, was said to have received no interpretation by their Lordships in any of those particular cases. It may certainly be assumed that if it had been necessary for their decisions in those cases that that rule should have been dealt with they would have dealt

(*v*) [1899] 18 N.Z.L.R. 37.
(*w*) [1899] 1 Q.B. 480.
(*x*) [1899] 2 Ch. 696.
(*y*) [1887] 13 V.L.R. 368.
(*z*) [1888] 14 V.L.R. 584.
(*a*) [1899] 25 V.L.R., p. 483.
(*b*) [1884] 26 Ch. D. 55.
(*c*) [1844] 4 Ha. 9.
(*d*) [1850] 3 De G. & S. 97.
(*e*) 3 De G. & S. 629.
(*f*) [1876] 3 Ch. D. 359.
(*g*) [1894] A.C. 494.
(*h*) [1900] 1 Q.B. 504.
(*i*) [1898] 1 Q.B. 352.
(*k*) [1896] A.C. 450.

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with it. Only rule 4 of that Order XVI. was discussed, and they seem to have passed by or forgotten rule 5. But the argument which we have had the advantage of hearing suggests that possibly an important fact had failed to present itself to their Lordships in these cases. It is this, that the *Judicature Act* was an Act which did not intend to alter the principles of law which then prevailed. It was a practice Act to bring about a fusion of common law and equity and to ameliorate the practice of the Courts for litigants. The Judicature Rules were adopted in order to accommodate the operation and practice of the Courts to the principles which were established for that practice by the Act. We may, therefore, take it that whatever the rules may be, they were not intended to abrogate any rules of law or equity which theretofore prevailed. The consequence therefore in all those cases was that the House of Lords insisted that what was misjoinder at common law before the *Judicature Act* was misjoinder after that Act; that where you had at common law a misjoinder of *causes of action*, there was no cure for it, even if objection was taken to it after verdict. Their Lordships had no doubt that in all those cases which were common law actions, the misjoinder was one to which objection could be taken at any stage, and when it was challenged it was fatal.

But their Lordships were not called on to say what should happen in an equity suit, and, as I have said, that which used to exist as a principle in equity before the *Judicature Act*, exists to-day. In equity the principle is quite clear that wherever there was a general cause of suit for the plaintiff, he was entitled to bring his suit for the relief attaching to that whole cause of suit. If it was necessary for any part of that whole cause of suit to bring in another person as a necessary party, it was essential that he should be brought in, and, being in, he was not entitled to look around and say—"Matters not affecting me are included in this suit, and will entail loss to me." The answer is—"It is the plaintiff's whole suit, and you were brought in for one charge and you are necessary to that charge. Because there are other matters, and because it is inconvenient for you to have those other matters dealt with in the suit, you are not at liberty to compel the plaintiff to split up his whole suit, and bring one suit in respect of those

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matters in which you are concerned, and a second suit for all the rest of the cause of suit." That principle appears to be very distinctly laid down in the cases cited to us, and particularly in those of *Attorney-General* v. *Cradock* (*l*); *Hamp* v. *Robinson* (*m*). We think that rule is distinctly laid down also in *Mitford on Pleading*; it is there stated as a general rule prevailing in the Courts of Equity.

A number of cases were cited to us which seemed to throw doubt on that matter, as, for instance, *Jerdein* v. *Bright* (*n*) and *Bent* v. *Yardley* (*o*). In those cases there appear, however, to be very important distinctions. In one case the act complained of by the plaintiff was one which might be right or might be wrong, and there was no allegation that the second defendant brought in was colluding with the other defendant, or was guilty of fraud, so as to make him necessary in the suit in which the other defendant was being sued. Therefore he did not appear to be a necessary party to any part of the suit, and the objection of mulitfariousness was allowed. In the other case of *Bent* v. *Yardley* the position appeared to be that not only was a trust fund sought to be made good against the trustee, and another defendant was brought in for that purpose, but the suit went on to ask that the fund having been restored should be administered. Therefore there were two separate equities, and the other defendant was only interested as to one of them.

There, however, appears to be one unbroken line of authorities, if one follows them aright, to the effect I have stated, viz., that where the plaintiff's case is one whole case as understood in equity, and where a defendant is brought in as a necessary party to establish one aspect of that whole case, that defendant cannot disturb that whole case, because he is not concerned with the whole of it. That rule being applied to this case, we find that here is one whole cause. A trust insurance fund in the company was established by one Act of Parliament. It was placed under an obligation by a later Act of Parliament which declared it to be a trust fund, and in the pleadings it was so alleged. The company was in effect made trustee of that fund, and therefore whosoever assailed that

(*l*) [1837] 3 My. & C. 85.
(*m*) 3 De G. & S. 97.
(*n*) 30 L.J. Ch. 336.
(*o*) 2 H. & M. 602.

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fund would necessarily break the distinct obligation imposed by the Act of Parliament. This suit is one to have it declared that a series of means by which money was diverted from that fund were fraudulent, and to have restored to the fund the moneys fraudulently taken out of the fund, or fraudulently intercepted on their way into the fund. The one purpose of the plaintiff is to see that the Act of Parliament shall be observed, and that the insurance fund shall have replaced in it everything of which it has been deprived improperly and unlawfully. There is that one purpose and that one cause of suit. There are five particular sums of money alleged to have been improperly taken out of the fund, and there are five grounds upon which these sums are sought to be brought back into the fund. As to two of these the Australasian Company is a necessary party because it was directly concerned in them. One allegation is that that company fraudulently received 2000*l.* from the Alliance Company. The other is that the former company fraudulently entered into a collusive bargain with the latter company in order to reinsure with that latter company the balance of life policies of the former company so as to relieve the former company and to impose a burden of an unreasonable contract on the latter company. These two charges being made, the Australasian Company was an indispensable party; the suit could not be tried behind its back. That being so, the thing itself being one whole cause of suit, the Australasian Company is not now to be permitted to say—"This whole cause of suit must be split, because I am here. For my convenience there must be two suits." This is contrary to the rule to which I have referred.

That being so, there is no misjoinder of causes of action in the equitable sense before the *Judicature Act*. That is to say, there is no such multifariousness as a Court of Equity could before that Act have forbidden upon a demurrer. That view not only is supported by the authorities cited to us, and not only is a convenient and just one, but it also gives a meaning to rule 5 of Order XVI., which up to now has puzzled everybody as to what it could mean, assuming that the views expressed in the House of Lords to which I have referred were correct. But their Lordships were not called upon to consider that rule; when, however, one remembers what was the rule prevailing in Courts of Equity before the *Judicature*

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Act, one can understand what r. 5 was meant for. That also helps to accommodate these rules in Orders XVI. and XVIII. to one another and to show that there is nothing novel as compared with the old practice anterior to these rules.

For those reasons we think that in this case there is no ground of complaint at all, and that therefore disposes of the whole matter. The Court answers the questions as follows:—

(1.) No. There is no such misjoinder.

(2.) No.

(3.) In the view of the two first answers it is unnecessary to answer this question.

As the plaintiffs succeed, the defendants will pay the costs of this reference.

Solicitors for plaintiff: *Hodgson & Finlayson.*

Solicitors for defendants: *Madden & Butler; Malleson, England & Stewart.*

W. H. M.

WARD *v.* MILLER.

HOOD, J.
1904
August 17.

Imprisonment of Fraudulent Debtors Act 1890, *Part III.—Service of order for payment—Justices Act* 1890, *s.* 23—*Personal service.*

Before proceedings can be taken under Part III. of the *Imprisonment of Fraudulent Debtors Act* 1890, upon an order for payment of money made by a Court of Petty Sessions, the order or a copy thereof must be served upon the debtor in person.

Service on the debtor by delivering it to another person in the manner prescribed for the service of a summons by sec. 23 (1) of the *Justices Act* 1890 is nsufficient.

ORDER TO REVIEW.

The Court of Petty Sessions at Prahran on 27th June 1904, on the complaint of one Hannibal Theodore Ward for money due on a cheque, made an order against one James Miller, the defendant herein, that he should pay to the complainant the sum of 2*l.* 16*s.* 6*d.* A true copy of this order was on 1st July served upon the defendant "by delivering the same to his wife a person apparently of the age of 16 years and upwards for him at

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and within his last named and most usual place of abode at Hampton." The order not having been satisfied, on 13th July a "summons to debtor" in the form of the Fourth Schedule (Form I.) of the *Imprisonment of Fraudulent Debtors Act* 1890 was served upon the defendant by delivering the same to his wife in the same way, calling upon him to appear at the said Court on 10th July to be examined in the usual way. On the last-named date the defendant did not appear, and an order was made against him that unless he paid the said debt and the amount of 3 guineas costs within the space of three days therefrom he should be committed to prison for a month, on the ground that since the date of the original order he had had means to pay the amount in respect of which he had made default and had neglected to pay the same.

An order *nisi* to review this order of commitment was obtained on the grounds (*inter alia*)—

(1.) That it was not proved before the justices that the defendant was served properly or at all with the order for payment of money to be levied by distress.

(2.) That as a fact the defendant was not properly or at all served with the order for payment of money to be levied by distress.

On the return of the order *nisi*,

Herbert Barrett appeared to move the order absolute.

Starke to show cause—Though service of the order for payment is necessary, that service may be effected in the way prescribed by sec. 23 of the *Justices Act* 1890 for the service of a summons. *Reg.* v. *Scott* (*a*) merely decides that service is necessary, not that the order should be served on the debtor in person. Here the order for payment was served in the manner prescribed by the first part of sec. 23 (1) of the *Justices Act*. In the case of a summons service by leaving the same with some other person apparently of the age of sixteen or upwards at the last or most usual place of abode or of business" is a regular mode of service—it is not substituted service. The latter is provided for in the later part of the sub-section.

(*a*) [1879] 16 V.L.R. (L.) 16.

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[HOOD, J. Though "service" under the *Justices Act* may mean service in the manner prescribed by sec. 23, the necessity for service of the order for payment prior to the issue of a fraud summons is the creature of decisions of the Court. When the Court decided that service was necessary it clearly intended personal service. Proof that the order came to the debtor's knowledge was held insufficient in the absence of actual service: *Reg.* v. *Casey* (*b*).]

That view leads to the curious result that service of the actual fraud summons may be effected in the manner prescribed by sec. 23, while service of the order for payment cannot be so effected.

He also referred to *O'Keefe* v. *Collins* (*c*); *Irvine & Wanliss's Justices of the Peace* (2nd ed.), p. 230; rules 37 & 38 under the *Justices Act* 1890.

Herbert Barrett was heard only on the question of costs.

HOOD, J. The first objection taken in this order *nisi* is in my opinion fatal to the order of the magistrates. The foundation of the decisions in this Court requiring service of the judgment or order for payment upon the defendant before a fraud summons is served upon him is the preservation of the liberty of the subject, and the principle is that the defendant should know exactly the order made against him before proceedings are taken upon which he may be sent to gaol. That principle applies equally to the police court, notwithstanding the ingenious argument of counsel to the contrary. The order will be made absolute, but, having regard to the facts set forth in the affidavit, without costs.

Order absolute without costs.

Solicitor for complainant: *Fisken.*
Solicitor for defendant: *Lowe.*

J. M.

(*b*) [1886] 12 V.L.R. 525. (*c*) [1897] 23 V.L.R. 329.

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HODGES, J.

1904
September 19, 22.

GRAY v. GRAY *and Another.*

Executors, duties of—Legacies charged upon specifically devised real estate—Personal estate insufficient to pay legacies—Duty of executors to sell real estate to pay legacies—Costs.

Under the *Administration and Probate Act* 1890 it is the duty of executors, where the personal estate is insufficient to pay legacies which are charged upon specifically devised real estate, to sell such real estate in order to pay such legacies.

Legatee succeeding in a claim for payment of legacy in a certain priority allowed costs out of the general estate.

ACTION.

The facts fully appear in the judgment. By her statement of claim, indorsed upon the writ, the plaintiff claimed—(*a*) a declaration that her legacy had priority over all other devises and bequests in the said will (except the bequests to Jane Gray and Sarah Gray) and was chargeable on the property comprised in such devises and bequests; (*b*) an order for payment of the said legacy in such priority, together with interest thereon at the rate of 5*l*. per centum per annum from the 7th June 1893 until the date of payment; and, (*c*) if necessary, administration of the testator's estate.

The defendant William James Gray did not enter an appearance to the writ.

There were no further pleadings.

Dethridge for the plaintiff referred to *National Trustees Executors and Agency Company of Australasia Limited* v. *Doyle* (*a*).

Guest for the defendant Bamford referred to *Williams on Executors* (9th ed.), pp. 566, 567.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

HODGES, J. Thomas Gray, who died on the 7th June 1893, left a will appointing the defendants William James Gray and Charles Bamford his executors, and to them probate was granted

(*a*) [1898] 24 V.L.R. 626.

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in July 1893. By that will the testator bequeathed to each of his three daughters, Jane, Sarah, and Charlotte Gray, the sum of 150*l.*, and subject to the payment thereof he devised to his son, the defendant William James Gray, certain real property, and to each of his other four sons, Charles, Robert, Frederick, and George, certain other real property. The personal estate of the testator was insufficient, after the payment of the debts and ordinary expenses, to pay each of the three daughters the sum of 150*l.*, and the amount that remained after the payment of those debts and expenses would only suffice to pay each of them 117*l.* Two of the daughters accepted that sum in discharge of their respective claims; the third, the plaintiff Charlotte Gray, refused to accept that sum, and insists that it is the duty of the executors to retain all the real estate until the payment of her legacy, or to mortgage or sell sufficient of the real estate to pay her legacy; and that the defendants, who have transferred to William James, Charles, and Robert Gray their portions of the land, have done so wrongfully. The defendant William James Gray has not appeared, and it is suggested that he is penniless and has made away with the property that the defendants—himself and the other defendant—transferred to him, together with the 117*l.*, plaintiff's share of the personal estate, which was left in his hands. He not having appeared, motion is made for judgment as against him, and as against him there will be judgment in default of appearance.

On behalf of the defendant Bamford it is contended that, apart from the *Administration and Probate Act* 1890, the executors would have paid the legacies as far as the personal estate would extend; that the legacies would have been charged on the real estate; that the legal title to the real estate would have passed to the sons charged with the payment of legacies; that the only duty of the executors would have been to pay the legacies so far as the personal estate would go; and that the devisees of the real estate would have been under the obligation to raise the money to pay the legacies; and that such devisees were the only persons who could make title for that purpose; and reliance was placed on a note to a passage in *Williams on Executors* (9th ed.), p. 577, which reads—"So where the estate is devised to another charged with the payment of debts, the doctrine of implying a power in the executors

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does not apply, for there the money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person, and the only person, that can make a legal title," and the cases of *Colyer* v. *Finch* (b) and *Corser* v. *Cartwright* (c) are referred to as establishing that proposition.

Then, coming to the *Administration and Probate Act* 1890, counsel for the defendant Bamford contended that sec. 7 gives executors power and authority to sell only where the sale is necessary for the payment of debts. Of course a legacy is not a debt in the sense in which the word "debt" is used in that section, and consequently it was contended that the executors had no authority to sell here. He further put it that, even if he had authority to sell, there was no duty to do so—that even if the power existed, there was nothing which made it his duty to exercise that power. In my opinion that is a very narrow construction of the *Administration and Probate Act* 1890. Sec. 6 of the Act provides that real estate, whether held beneficially or in trust, is to vest upon the death of a person in the executor for all the estate of such person. Sec. 7 makes the real estate assets for the payment of debts and further provides that "it shall be lawful for such executor or administrator to sell or mortgage such real estate with or without a power of sale and to convey the same to a purchaser in as full and effectual a manner in law as the testator or intestate of such executor or administrator could have done in his lifetime." It may be that that general power in that part of the section, if that section stood alone, would be limited to the case where a sale was rendered necessary for the payment of debts. Then we come to sec. 8, which provides—"Subject to the provisions of this part of this Act the real estate of every deceased person shall be held by the executor or administrator of such person as follows that is to say:—(1) If such deceased person devised such estate by will such real estate shall be held by the executor or administrator according to the trusts and dispositions of such will." Sec. 6 vests all the estate referred to in the will in these executors. Sec. 8 then says that the estate so vested in them is to be held by them according to the trusts and dispositions of such will. So that it is to be held by them—the title is in them—

(b) [1856] 5 H.L.C. 905. (c) [1875] L.R. 7 H.L. 731.

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subject to the duty or obligation of paying the legacies which the will charges upon the real estate. If any doubt existed by referring to that section only I think it is entirely removed by sec. 9, which provides that "the executor or administrator of any deceased person shall have the same rights and be subject to the same duties with respect to the real estate of such person that executors or administrators heretofore have had or been subject to with respect to personal estate." There is no doubt that if this had been personal estate it would have been the duty of the executors to have dealt with it with a view to these persons getting their legacies. In my opinion that section says that that is practically their duty. I do not understand how, if this had been personal estate, it could have been doubted to be their duty, and it is now vested in them subject to the same duties—not only subject to the same rights but to the same duties as personal estate. So that the executors have the same duties with regard to this estate as if it had been personal estate. I think, therefore, that the Act vests the property in the executors; that it vests it in the executors for the estate or for the trusts mentioned in the will, and that it is in the executors in precisely the same way as if it had gone straight to the devisees, subject to the payment of this legacy. So that it has gone to the executors subject to the payment of this legacy. It is the duty of the executors in my opinion to take steps to secure to the beneficiary the payment of the amount of her legacy.

(His Honor then dealt with another question not material to this report, and determined the amount payable to the plaintiff, allowing interest at the rate of 4 per centum per annum, and continued):—

As to the question of costs, I think the defendant has acted very generously in not asking for costs so far as he is concerned, and he will be left to pay his own costs. With regard to the plaintiff, I think she must get her costs out of the general estate, not out of her own estate. She had to come here to protect her own interests—to protect her own rights—and I cannot require that her estate should pay for the legal proceedings which have been forced upon her. I have felt some difficulty in making the general estate pay the costs, seeing that the other beneficiaries are

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not before me, but I think I must take it that the defendant executor practically represents the persons entitled to the real estate.

Judgment for the plaintiff, with costs out of the general estate.

Solicitors for the plaintiff: *Hickford & Balmer* (for *Clarke*, Benalla).

Solicitors for the defendant Bamford: *Lamrock, Brown & Hall.*

H. I. C.

F.C.
1904
September 13, 14.

BENDIGO GAS COMPANY *v.* THE COUNCIL OF THE CITY OF BENDIGO.

Rates and rating—Practice—Rate appeal—Undertaking rated to different municipalities—Choice of method of appeal—Local Government Act 1903 (*No.* 1893), *ss.* 301, 302 (1), 306.

An undertaking rated to different municipalities is not obliged to appeal under sec. 306 of the *Local Government Act* 1903, but in a proper case has the right of appeal either under that section or under sec. 302 of the Act.

SPECIAL CASE stated by His Honor Judge Molesworth, a Judge of the County Court, for the opinion of the Supreme Court:—

(1.) This appeal came on for hearing at the County Court at Bendigo on the 3rd and 4th days of March 1904. At the close of the evidence I reserved my judgment. After I delivered my judgment I was asked by respondent's counsel to state a case for the opinion of the Full Court (*inter alia*) upon the question following:—

> Was the appeal, in view of the objections taken and appearing in paragraph 4 hereof, rightly before the Court?

(2.) Appended hereto and marked "A" is the notice of appeal.

(3.) It was admitted that such notice was served on the Town Clerk of the respondent Council on the 5th day of February 1904, and that it was given within one month after the making of the

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rate appealed against, being the time limited by sec. 302 (1) of the *Local Government Act* 1903 (No. 1893).

(4.) A preliminary objection was taken by counsel for respondent that the appeal was not rightly before the Court, on the following grounds:—

Firstly:—That sec. 308 of the said Act had not been complied with, inasmuch as a copy of the last annual account of the total receipts and expenditure of the appellant company had not been served with the notice of appeal. It was admitted that the respondent's valuer had, previous to making his valuation, procured from the appellant a copy of the account for the first six months of the year 1903.

Secondly:—That sec. 309 of the said Act had not been complied with, inasmuch as the appellant did not, on the same day as the service of the notice of appeal upon the respondent, serve a copy of the said notice on the Registrar of the County Court at Bendigo but that such service was made on the 15th day of February 1904.

(5.) It was contended for the appellant that the appeal was brought under sec. 302 of the *Local Government Act* 1903, and that as the appellant's several properties within the city of Bendigo were separately rated and the appeal was against the valuation of one only of such properties by the respondent municipality only, secs. 308 and 309 did not apply, and that if they did they were directory only.

(6.) After hearing counsel I overruled the objections and heard the appeal on its merits.

The question for the opinion of the Supreme Court is:—

Was I right in overruling the preliminary objection taken by counsel for the respondent, that the appeal was not rightly before the Court, or should I have allowed the objection and struck out the appeal?

Hickman Molesworth,
Judge of the County Court.

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Mitchell, K.C., and *Box* for the respondent Council in support of the preliminary objection.

Bryant for the appellant company, to oppose, cited *Melbourne and Hobson's Bay United Railway Company* v. *Town of Richmond and Another* (a).

The arguments sufficiently appear from the case stated and the judgment.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HODGES and HOOD, JJ.] In this case we think as to this point that the learned Judge below was right, and that we should so answer the first question in the case. The matter is by no means an easy one to determine, and for this reason—that although the language is as plain as language can well be as giving a choice to an appellant of the character of the appellant here to come under sec. 302 or sec. 306, we find this series of sections, including and following sec. 306, enacted by the Legislature, and we cannot but suspect that the Legislature had some wise and distinct purpose in giving that particular appeal. It is impossible to conjecture what that purpose was from the language itself except just this—that the Act itself is constructed upon a scheme which is quite plain and clear, and makes that scheme part of the Act's enactment. This particular portion of the Act is divided into two subdivisions of the division headed "Appeals against rates," one subdivision being styled "Generally" and the other "Where one undertaking is rated to different municipalities."

Before this Act was enacted the highest authority had decided that these headings in Acts of Parliament may be read as part of the Act, but are only to be referred to when the language of the section itself is doubtful. Now here we have that view strengthened by sec. 1 of this Act and sec. 21 of the *Acts Interpretation Act* 1890; and when we find, therefore, subdivisions of that kind made by the Legislature, one of which is designated as "Generally," as if to apply to all the common class, and the other is designated "Where one undertaking is rated to different municipalities," as if to apply only to a particular class (being the class

(a) [1878] 4 V.L.R. (L.) 81.

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to which the present appellant belongs), one is embarrassed by these headings. But for all that the principle must prevail that the Act itself in its sections must always be looked to, and unless the Court is embarrassed by the language itself, it ought not to look abroad for assistance in its interpretation. In the present case sec. 301 gives a general appeal to Petty Sessions in respect of "(*a*) the valuation of any rateable property included in any rate or (*b*) the amount assessed thereon." Now that subdivision of the subject-matter of the appeal is so large as practically to involve every subject-matter of appeal in respect of rates under this Act that can be imagined. Then sec. 302 (1) provides that "If any person thinks himself aggrieved for any cause of grievance whether cognizable under the last preceding section or not by any rate made under the authority of this Act or by any other matters included in or omitted from the same he may at any time within one month after the same is made give notice in writing to the council of his intention to appeal to the next County Court which is held nearest to the rateable property in respect of which such appeal is made." Now that language is absolutely comprehensive. If there be any doubt as to the generality of the language in sec. 301 there can be none here, and therefore the right of appeal is given to any person who thinks himself aggrieved for any reason in respect of any matter. However, one finds that, that right having been given, sec. 306 also gives the right of appeal, although it is indeed referable to the case where the subject-matter is one undertaking which according to the law is subject to more than one separate valuation for the purpose of rating. In that case also the person rated "may appeal from the valuation thereof in manner hereinafter provided," and that "notwithstanding anything in this or in any of the said Acts contained"—meaning the Melbourne and Geelong Acts referred to in the section. The result, therefore, is that you may appeal under sec. 302, and if you are of the special character mentioned you may also appeal under sec. 306; but the choice is with yourself. The language is clearly that of mere discretion or choice in the person appealing. And if we look for any reason why sec. 306 should be confined as a means of appeal to persons in this particular class, we find nothing at all. The only thing provided by the subsequent sections is that they must

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pursue a somewhat more burdensome course in giving certain notices. There is no advantage as far as an appellant is concerned, because these things give further trouble; and one cannot see any advantage to the municipalities, because they can get all that is involved there otherwise. Consequently one cannot see by examining the inherent purposes of these sections anything which suggests what the Legislature was intending or designing to do. Apparently there may be something to be gained, but that is left to the choice of the person appealing. So that, as the language is permissive obviously, and alternative, we cannot say that that language ought to be read as though it were imperative or exclusive, and, inasmuch as the purpose or intention of both the sections is to secure an appeal to a person aggrieved, we think it is outside the ordinary rule of interpretation that we should take upon ourselves, because we suspect that the Legislature may have had some wise and distinct purpose in view in providing the appeal under sec. 306, to cut down the right of appeal which the generality of the language of the Legislature in sec. 302 (1) gives without any restriction. We therefore think that the learned Judge was right in the view he took in overruling the objection as to the method of launching the appeal.

Question answered that preliminary objection rightly overruled.

Solicitor for the appellant company: *Edward Cohen* (for *Cohen, Kirby & Woodward*, Bendigo).

Solicitor for the respondent Council: *B. P. B. Rymer* (for *Quick, Hyett & Rymer*, Bendigo).

H. I. C.

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ELECTRIC SUPPLY COMPANY OF VICTORIA *v.* THE COUNCIL OF THE CITY OF BENDIGO.

F.C.
1904
September 14.

Practice—Rate appeals—Case stated by County Court Judge for the determination of Supreme Court—Form of case—Jurisdiction to ask questions—Local Government Act 1903 (*No.* 1893), *s.* 302 (4).

Sec. 302 (4) of the *Local Government Act* 1903 does not authorize a County Court Judge, in stating a case for the determination of the Supreme Court, to ask any questions, but he has merely to state the facts of the case as found by him.

SPECIAL CASE stated by His Honor Judge Molesworth, a Judge of the County Court, for the opinion of the Supreme Court.

The case stated, which was in the form of a statement of evidence, with questions subjoined, need not, for the purposes of this report, be set out.

Isaacs, K.C., and *Bevan* for the appellant company—There is a preliminary objection to the form of the case stated. The procedure in regard to rate appeals is purely statutory, and the power of the County Court to state a case in connection therewith is contained in sec. 302 (4) of the *Local Government Act* 1903, which provides that "the Court before whom the appeal is heard and determined shall if so required by any party to such appeal *state the facts* by way of special case for the determination of the Supreme Court thereon in which case that Court may determine the same." The learned Judge had therefore no jurisdiction to ask any questions.

Mitchell, K.C., and *Box* for the respondent Council—The submission of questions is merely a convenient way of drawing attention to the difficulties which the learned Judge has, and even if the construction of sec. 302 (4) contended for be correct, the questions are mere surplusage.

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Madden, C.J.

MADDEN, C.J., delivered the judgment of the Court [MADDEN, C.J., HODGES and HOOD, JJ.], and after remitting the case to the learned County Court Judge, on the ground that, in the absence of any finding as to the capital value of the appellant company's undertaking, it was impossible for the Full Court to determine the case, continued :—" It may be well also to remember that the *Local Government Act* 1903 does not authorize the asking of any questions at all, but rather calls upon the County Court Judge to state the facts for the determination of the Supreme Court on the questions of law. If there are any disputed facts, of course the learned Judge should find them like a jury. What the Statute apparently contemplates is merely a statement of the facts They are to be simply enumerated, and if they are disputed then the learned Judge has to find the true facts. But without the ascertained facts are indicated, of course this Court cannot determine the case. The case will therefore be remitted to the learned County Court Judge."

Case remitted.

Solicitor for the appellant company : *Home.*

Solicitor for the respondent Council : *B. P. Rymer* (for *Quick, Hyett & Rymer*, Bendigo).

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MITCHELL *and Another v.* BOWEN.

A'BECKETT, J.

1904
September 22.

Mines Act 1890 (*No.* 1120), *s.* 3—"*Claim*"—*Marking out—Pegs placed on land which could not be lawfully taken up as a claim—Title to land within the pegs which could have been lawfully taken up—By-law No.* 4 *of the Castlemaine Mining Board, clauses* 1 *and* 3.

A by-law provided that an alluvial claim shall be marked out by placing a substantial peg of a specified size at each corner of the claim, and that the extent of the ground marked out shall be in proportion to its depth.

The complainants purported to mark out under the by-law certain land. Three of the pegs were placed on land which could not lawfully be taken up as a claim. However, a large proportion of the land marked out could have been lawfully taken up as a claim.

Held, that the marking out gave the complainants no title under the by-law to any portion of the land included in the marking out.

SPECIAL CASE stated by a Warden of the Goldfields at Maldon.

The special case set forth that the proceedings commenced by a Warden's summons to the defendant, John Bowen, to answer the complaint of Joseph Mitchell and three other persons, "the holders of miners' rights in full force and virtue and the applicants for registration of and holders of a mining claim of four men's ground situate near the eastern township boundary of Maldon, in the Tarrengower division of the Mining District of Castlemaine, by which complaint they seek for an order restraining you, your agents, workmen, and servants from occupying, interfering with, or trespassing upon the said claim or the land, earth, soil, or sand, or any part thereof, and to recover from you the sum of 28*l.* damages for such trespass and removal committed by you on the 22nd and 23rd days of February 1904 and thereafter."

The special case then proceeded:—"The summons came on for hearing before me on the 11th and 18th April 1904, both parties being represented by counsel, when it was proved that the complainants on the 22nd February 1904 marked out under by-law No. 4 of the Castlemaine Mining Board By-laws, clauses 1 and 3, by pegs and trenches as therein prescribed, certain land at Maldon for a claim under their miners' rights. Mining lease No. 4834, Castlemaine, lawfully subsisting and attached hereto and forming part of this case, was put in evidence, together with the map or plan annexed to the said lease and referred to therein, by which it appeared that the lessee under such lease, namely the

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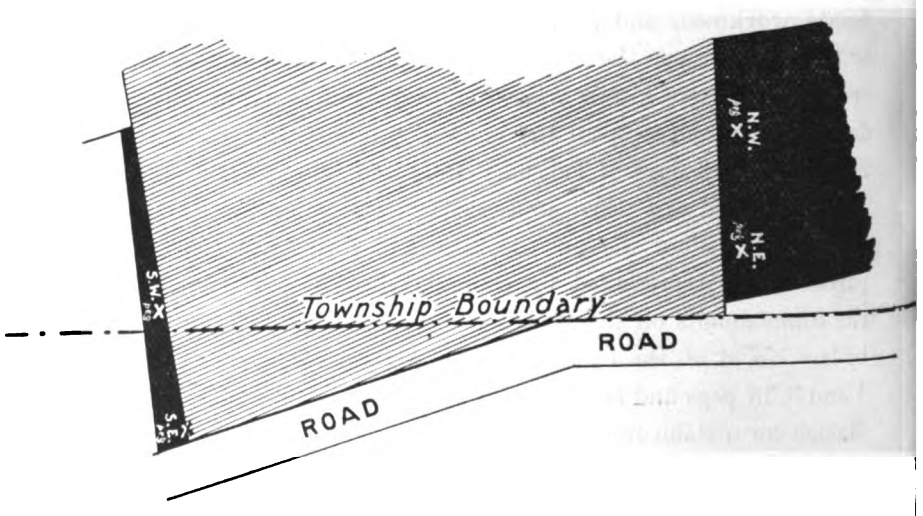
'Beehive and German Consolidated Gold Mining Company No Liability' held on the surface and from the surface down the land coloured yellow (black on sketch plan below) on the map or plan, and that certain other land coloured brown (hatched part on sketch plan below) on the map or plan was excepted from the said lease to a depth of 150 feet.

"It was further proved that portion of the land included in the complainants' pegging was part of the land so coloured brown on the plan, but that both on the north and the south of the portion coloured brown included in complainants' pegging was land coloured yellow on the plan. And it was also proved by the evidence of the Mining Surveyor at Maldon that the complainants' south-east peg had been placed by the complainants and was on the boundary line between the land so coloured brown and the land to the south coloured yellow on the plan, and that their south-west peg had by them been placed and was on the land to the south so coloured yellow; that their north-west peg and their north-east peg had by them been placed and were on the land to the north so coloured yellow.

"A plan made by the said surveyor from a survey by himself, showing the position of complainants' pegs, was put in evidence. The sketch plan shows position of the pegs."



[The hatched part was coloured brown on plan and the black yellow.]

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"The land shown on this plan was identified by the said surveyor as being portion of the land included in the said lease.

"The complainants had no authority from the said company to enter or fix any of the said pegs or to occupy any of the land included within such pegs.

"The said by-laws were put in evidence, and now form part of this case.

"Counsel for the defendant then contended that on the facts proved complainants' pegging was a nullity, and that they had no title to the claim and were in illegal occupation and possession of the said land claimed by them.

"Complainants' counsel contended that the complainants were entitled to hold as a claim under the said by-laws the land coloured brown as aforesaid included in such marking out; that that portion of the land was open for occupation under miners' rights; and that complainants' marking out gave them a good title to the same though three of the complainants' pegs were placed on the ground marked yellow.

"After argument I intimated that I would be prepared to hold that the complainants' marking out did not entitle them to be deemed to be the holders of a claim within the meaning of the by-laws, whereupon counsel for complainants asked that I should state a special case, and I therefore in pursuance of such application reserved for the opinion of the Supreme Court the following question:—

"'Does such marking out as aforesaid by the complainants give them a good title under the by-laws of the Castlemaine Mining District to the whole or any portion of the land included in such marking out?'"

The material parts of the said by-law No. 4 was as follows:—

"ALLUVIAL WORKINGS.

"1. *Marking Claims.*—In marking alluvial claims all parties shall do so by placing a substantial peg, of not less than 2 inches in diameter, at each corner of the claim, which shall stand at least 2 feet out of the ground; they shall also cut a well-defined V trench, where practicable, which shall extend at least 2 feet from each post along each boundary line of said claim.

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"3. *Old Alluvial Workings.*—The extent of ground for each man employed on old or abandoned ground shall not exceed 250 feet by 250 feet in ground 80 feet and upwards in depth."

Each party claimed to have been in prior possession of the land; and, for the purpose of obtaining a decision on the question of the legality of the marking out, it was agreed between the parties that no question as to either party being a trespasser should be raised.

Collins for the complainants—It is admitted that the land marked out comes within the definition of a "claim" in sec. 3 of the *Mines Act* 1890. The wording of sec. 3 is practically identical with that of sec. 49, the decisions on which are to the effect that, upon the granting of a lease which includes land held under a miner's right, such land is *ipso facto* excised from the lease. In the case of *Coates* v. *South Loch Fyne Company* (a), Holroyd, J., says:—"The grant of a mining lease, which comprises land lawfully occupied at the time as a claim by the holder of a miner's right, cannot destroy the title of the claim-holder. It has simply no effect upon it, just as if the claim had been excised from the area included in the lease." Several authorities are cited in support of that view, including *The Aladdin G. M. Co.* v. *The Aladdin and Try Again United G. M. Co.* (b). The words the subject of decision in those cases are no stronger than those in sec. 3; and so in this case, if the complainants have pegged out land which cannot be the subject of a claim, the validity of their title to such part of the land as is open to occupation is not affected. Again, the decisions show that, where a claim is taken up in excess of the amount allowed by the by-laws, the excess may be abandoned. In those cases, of course, the pegs are not at the four corners of what is the actual legal claim, nor need they be in this case; and the claim, so far as it relates to the yellow land, may be abandoned. *Cf. Bryson* v. *McCarthy* (c); *Oxley* v. *Little* (d); and *Barlow* v. *Hayes* (e). The cases which approach most

(a) [1900] 25 V.L.R. 543, at p. 553.
(b) [1869] 6 W.W. & A'B. (Eq.) 266, at p. 281.
(c) [1869] 6 W.W. & A'B. (M.) 35, at pp. 36, 37.
(d) [1868] 5 W.W. & A'B. (M.) 14, at p. 19.
(e) [1867] 4 W.W. & A'B. (M.) 67.

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closely to the position here are those where mining claims have been taken up on roads. By sec. 15 of the *Mines Act* 1890 roads are exempted from mining, though under sec. 19 the holder of a miner's right or of a lease may obtain permission to mine upon any road; but any road is clearly exempted until such permission has been granted. Still, however, a road or part of a road may be marked out as a claim before the permission to mine thereon is applied for. *Cf. Sims* v. *Demamiel* (*f*); *Parade G. M. Co.* v. *Victoria United Mining Co.* (*g*); and *Talent* v. *Dibdin* (*h*), in which, though the precise question here was raised, no decision was given in regard to it. It seems to be put in the judgment in that case that if the adjoining property, being private land, made the pegging-out by the surveyor impossible, no title could be acquired under the by-law; but the case certainly does not decide that, assuming the pegs had been put on the private land, so much as was available for occupation would have been invalidly marked out. There is, of course, nothing on the ground itself to indicate the dividing line between the brown and the yellow land. The Act does not contemplate that a man should take a surveyor with him, so as to make certain *ab initio* that he is marking out land available for occupation, because the Act itself provides for readjustment as to boundaries, etc., after marking out: See *Mines Act* 1890, secs. 106 (3) (5) and 135.

McCay for the defendant—There are two distinct things in connection with a claim—(1) taking possession in accordance with the by-laws, and (2) subsequent occupation for the purpose of gold mining: See definition of "claim" in *Mines Act* 1890, sec. 3. The argument for the complainants has been directed to show that their occupation is good, and it has assumed that their taking possession is good. The pegging out is effected "by placing a substantial peg at each corner of the claim." If this is not done there is not a compliance with the by-law, and the question of subsequent occupation is entirely immaterial. The cases cited merely show that, where the taking possession is right, but the

(*f*) [1896] 21 V.L.R. 634, at p. 640.
(*g*) [1877] 3 V.L.R. (Eq.) 24, at p. 29.
(*h*) [1882] 8 V.L.R. (M.) 31.

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occupation is wrong, the Courts are disposed to treat the occupant equitably or charitably, and to say that his occupation is good as regards what he is legally entitled to occupy. The holder of a miner's right has great privileges, but he has to exercise them at his own risk. The exemption created by sec. 15 of the *Mines Act* 1890 is an exemption from occupation as distinguished from an exemption from taking possession. The section prevents you from using the subsoil, but there is nothing to prevent you from taking possession, as is pointed out in *Parade G. M. Co.* v. *Victoria United Mining Co.* (*i*). That case and *Sims* v. *Demamiel* (*k*) show clearly that the proper course to pursue is to take possession of the road with your pegs, and then apply to the proper authorities for the permission which is a condition precedent to mining on the subsoil. The authority which comes nearest to this case is *United Sir William Don Company* v. *Koh-i-noor Company* (*l*).

(He was stopped.)

A'BECKETT, J. What I take to be the facts in this case are that the pegs which marked out this claim were undoubtedly put in such a position as to comprise land which could not be lawfully taken up as a claim, and if I have to sustain the validity of the marking out of the land included by the lines between these pegs, it would be necessary to maintain the position that, if there were within the boundaries ascertained by lines drawn between pegs put on private property or other land clearly exempt from mining land which might be lawfully appropriated by putting pegs therein, there would be a valid marking off of such last-mentioned land. I think that such a view as that would be opposed to the language of the by-law and the intention of the by-law—the intention of the by-law obviously being that there should be some visible marks to show the extent of ground claimed, and to afford a reasonable test as to whether a claim was or was not lawfully taken up.

Now the principle of validating claims confined to some space within that area would destroy altogether the advantages which are supposed to arise from these marks being observable and

(*i*) 3 V.L.R. (Eq.) 24.
(*k*) 21 V.L.R. 634.
(*l*) [1866] 3 W.W. & A'B. (M.) 63, at p. 79.

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ascertainable. One would never know where a claim was—it would be an undefined thing. I have stated during the course of the argument that I am surprised that a matter, which, I should think, must have arisen frequently, has not apparently been the subject of direct decision. I have had a very ingenious argument addressed to me, and if I adopted it, by a sort of principle of analogy justified by some cases cited, I should be able to hold that, because of there being some land within these boundaries which could be marked out as a claim, that therefore by the marking out of some land outside such land the land which could be marked out as a claim would be regarded as legitimately acquired. I think that would be carrying the analogy to an extent not only unwarrantable, but in opposition to what I think is the meaning of the by-law. I have not to deal with a difficulty such as might arise with regard to the questionable position of one of the posts by which a claim was marked off—as to whether it did or did not intrude upon property which could or could not be taken up. Here, I am glad to say, the position is plain, being the marking out of an area to an appreciable part of which a person could not properly acquire a title.

I therefore answer the question asked—"No, not to any portion;" and direct that complainants should pay the costs.

Question answered in favour of defendant.

Solicitor for the complainants: *Cornish*
Solicitors for the defendant: *McCay & Thwaites.*

H. I. C.

END OF VOLUME XXIX.

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ACTION, CAUSE OF—*continued.*

which in itself may be indifferent or even lawful, is a criminal conspiracy: *O'Connell's Case* ([1844] 11 Cl. & F. 155); and where harm results an action lies against them by the person injured: *Quinn* v. *Leathem*. A person who procures the act of another is legally responsible for its consequences, even though the act induced is within the right of the immediate actor, if it be to the detriment of a third person, and if he can be shown to have procured his object by the use of illegal means directed against that third party: *Lumley* v. *Gye* ([1853] 2 E. & B. 216). *Mogul Steamship Co.* v. *McGregor, Gow and Co.* ([1889] 23 Q.B.D. 594, [1892] A.C. 25), *Temperton* v. *Russell* ([1893] 1 Q.B. 715), *Allen* v. *Flood* ([1898] A.C. 1), and *Quinn* v. *Leathem* ([1901] A.C. 495) discussed. MARTELL *v.* VICTORIAN COAL MINERS' ASSOCIATION - - - - - - - - - 475

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BANKER AND CUSTOMER—*Cheque, fraudulent alteration of—Negligence of customer in filling up cheque.*] A cheque was drawn by one of three executors in such a way as to permit of the spaces left in the cheque being filled up. The cheque in this form was signed by all the executors, and the executor who had thus drawn the cheque subsequently filled in the spaces with letters and figures for a far larger sum than the amount of the cheque as presented to the other two executors for their signature, and the banker paid the same, and the first executor misappropriated the amount representing the altered cheque. In an action by the other two executors to recover the extra amount of the cheque thus fraudulently altered:—*Held*, that the plaintiffs could not recover:—*Per* HODGES, J. That the contract between a banker and his customer is, that while the banker undertakes to honour the cheques of his customer, the latter on his part undertakes that he will not, by the method of drawing such cheques, give facilities for their alteration, or that the customer undertakes that if the banker is misled by his fault in the manner of filling up the cheques the loss shall fall upon the customer:—*Per* HOOD, J. The customer of a bank undertakes that he will not draw his cheques in such an unusual way as to afford facilities for fraud, and if he does so he must bear the loss. *Young* v. *Grote* ([1827] 4 Bing. 253) followed. MARSHALL *v.* THE COLONIAL BANK OF AUSTRALASIA LTD. [804
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BUILDING SOCIETY—*Rules—Construction—Rights of priority—Matured shareholder—Withdrawing shareholder—Stoppage of business—Recognition that business must be stopped—Rules ceasing to operate—Right to payment in full—Deduction of losses from amount at credit of shares—Alteration of rules seriously affecting particular member—Building Societies Act* 1890 (*No.* 1068), *ss.* 8 (11), 28—*Arbitration clause—Jurisdiction of Court—Arbitration offered and declined.*] The fact that the interests of a particular member are more seriously affected by an alteration in the rules of a building society than those of other members does not make the altered rules invalid. The principle of *Pepe* v. *City and Suburban Building Society* ([1893] 2 Ch. 311) and *Strohmenger* v. *Finsbury Permanent Investment Building Society* ([1897] 2 Ch. 469) applied. The principle of *In re Ambition Investment Building Society* ([1896] 1 Ch. 89), that before the winding-up of a society there may be a point of time after which it would be inequitable to recognize attempts to change positions and gain priorities, and that for this reason, and in view of an impending winding-up which afterwards follows, the rules may, for certain purposes, be considered as ceasing to operate from that point, is inapplicable in a case where no winding-up has taken place. The construction of the rules of a building society as to priority of payments to shareholders, and as to deductions for losses from the amounts payable on withdrawn and matured shares, considered :—*Held*, that a provision for arbitration in the rules of a building society made under the provisions of the *Building Societies Act* 1890 did not *per se* oust the jurisdiction of the Court, whatever might have been urged if arbitration had been offered and declined, and an application had been made to stay the action. The English authorities as to the character of disputes between a building society and its members which may be submitted to arbitration turn upon the special provisions of the English Act creating a special tribunal to deal with such matters, and are not authorities on the Victorian *Building Societies Act* 1890. SYME *v.* THE UNITED VICTORIA PERMANENT BUILDING SOCIETY - - - 671

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2. —— *Rules — Construction — Rights of priority—Matured shareholder—Withdrawing shareholder—Society in financial difficulties—Stoppage of regular business—Rules ceasing to operate—Right to payment in full—Deduction for losses from amount at credit of shares—Cessation of membership—Alteration of rules aimed at particular member—Building Societies Act* 1890 (*No.* 1068), *ss.* 8 (11), 28—*Arbitration clause—Application of arbitration clause to shareholder whose membership has ceased—"Any person claiming through or on account of a member"—Jurisdiction of Court.*] *Held*, that a rule of a building society that "if any dispute arise between the Society and any member of the Society or any other person claiming through or on account of a member and the Directors on any matter the same shall be referred to arbitration," did not apply to the holder of unpaid matured shares, whose "connection with the Society had," under its rules, "ceased and determined" upon the maturity of his shares :—*Held*, that a rule made with the object of interfering with the rights under the rules of a building society of a particular member of the society was *ultra vires*. The principle of *In re Ambition Investment Building Society* ([1896] 1 Ch. 89) that before the winding up of a society there may be a point of time after which it would be inequitable to recognize attempts to change positions and gain priorities, and that the rules may, for certain purposes, be considered as ceasing to operate from that point, discussed. The construction of the rules of a building society as to cessation of membership, the priority of payments to shareholders, and deductions for losses from the amount payable on withdrawn and matured shares considered. The decision of A'BECKETT, J. (*supra*, at p. 671 *et seq.*), as to the construction of the rules, in part overruled. SYME *v.* UNITED PERMANENT BUILDING SOCIETY - - - 917

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—— Apollinaris Co.'s Trade Mark ([1891] 2 Ch. 186) followed - - - 965
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—— Attorney-General *v.* Shire of Hampden (2 V.L.R. (Eq.) 138) distinguished 62
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—— Austin, *In re* (27 V.L.R. 408), applied [161
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—— Bank of Toronto *v.* Lambe (12 App. Cas. 575) applied - - - - - 748
See INCOME TAX.

—— Barter, *Ex parte* (26 Ch. D. 510), followed [69
See INSOLVENCY. 2.

—— Baxter *v.* Hill and Christie (18 A.L.T. 33), headnote in disapproved of - 114
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—— Bell, *In re* ([1896] 1 Ch. 1), distinguished [399
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—— Bickett *v.* Morris (L.R. 1 H.L. (Sc.)) discussed - - - - - - 765
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—— Britter *v.* Sprigg (26 V.L.R. 65) explained [987
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—— Cairns *v.* Peterson (2 V.L.R. 143) followed [841
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—— Carslake *v.* Hawthorn, President, etc., of (17 V.L.R. 560) followed - - 308
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—— Clement et Cie.'s Trade Mark ([1900] 1 Ch. 114) followed - - - - - 965
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—— Coode, In the Goods of (L.R. 1 P. & D. 449) followed - - - - - - 946
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—— Cook *v.* Knott (4 *Times* L.R. 164) distinguished - - - - - - 298
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—— Davidson *v.* Darlington (24 V.L.R. 667) followed - - - - - - 789
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—— D'Emden *v.* Pedder ([1904] 1 C.L.R. 91) distinguished - - - - - 748
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—— Dulon *v.* Roberts (11 A.L.T. 168) approved - - - - - - 652
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—— East Fremantle Corporation *v.* Annois ([1902] A.C. 213) discussed - 308
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—— Francis *v.* Cockrell (L.R. 5 Q.B. 501) discussed - - - - - - 459
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—— Great Western Railway Co. *v.* Selkirk Rural Council (86 L.T. 852) followed [447
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—— Harris, In the Goods of (L.R. 2 P. & D. 83) distinguished - 946
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—— Hockey *v.* Western ([1898] 1 Ch. 350) distinguished - - - - - 399
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—— *Income Tax Acts* (No. 4) ([1904] 28 V.L.R. 357) followed - - - - 748
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—— Huggard *v.* Huggard (7 A.L.R. 139) distinguished - - - - - 932
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—— Kearn *v.* Schuh (16 V.L.R. 199) followed [152
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—— Kirker, Greer & Co. *v.* Maynam (1 N.S.W. State Rep. Eq. 73) followed and approved - - - - - 172
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— Mackay, *Ex parte* (L.R. 8 Ch. 643) followed - - - - - - 69
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— McGrath *v.* Dobie (16 V.L.R. 646) followed - - - - - - 558
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— Melbourne and Metropolitan Board of Works *v.* Spencer (29 V.L.R. 62) affirmed - - - - - 289
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— Mogul Steamship Co. *v.* McGregor, Gow & Co. ([1892] A.C. 25) discussed 475
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— National Trustees Executors and Agency Co. Ltd. *v.* Johnson (18 V.L.R. 386) distinguished - - - - - 793
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— O'Donnell *v.* Hitchen (27 V.L.R. 711) followed - - - - - - 152
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— O'Sullivan *v.* McMahon (22 V.L.R. 55) overruled - - - - - - 558
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— Pepe *v.* City and Suburban Building Society ([1893] 2 Ch. 311) applied 671
See BUILDING SOCIETY.

— Powell *v.* Apollo Candle Co. (10 App. Cas. 282) distinguished - - 229
See COMMONWEALTH CONSTITUTION ACT. 2.

— Powis, In the Goods of (34 L.J. (P.) 55) followed - - - - - - 326
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— Queen, The *v.* Blackwood (16 V.L.R. 157) distinguished - - - - - 868
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— Quinn *v.* Leathem ([1901] A.C. 495) discussed - - - - - - 475
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— R. *v.* Biswell (2 Cox C.C. 279) disapproved of - - - - - 22
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— *v.* Hamilton (1 C. & K. 212) followed
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— *v.* Henkers (16 Cox C.C. 257) followed - - - - - - 22
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— *v.* John Chalmers (10 Cox C.C. 450) followed - - - - - - 28
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— *v.* Leake (5 B. & Ad. 469) followed
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— R. *v.* Nathalie Miard (1 Cox C.C. 22) not followed - - - - - 28
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— Russell *v.* Russell ([1897] A.C. 395) followed - - - - - - 732
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— Sargood *v.* Veale (17 V.L.R. 660) applied
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— Spratt *v.* Harris (4 Hag. 405) distinguished
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— Stephens *v.* Abrahams (29 V.L.R. 201) overruled - - - - - - 229
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— Stoddart *v.* Woods (15 V.L.R. 457) observations on - - - - - - 374
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— Strohmenger *v.* Finsbury Permanent Investment Building Society ([1897] 2 Ch. 469) applied - - - 671
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— Syme *v.* United Victoria Permanent Building Society (29 V.L.R. 671) varied 917
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— Tamplin, In the Goods of ([1894] P. 39) followed - - - - - - 946
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— Temperton *v.* Russell ([1893] 1 Q.B. 715) discussed - - - - - 475
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— Vinnicombe *v.* Macgregor (28 V.L.R. 144) overruled - - - - - - 32
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— Vivian, In the Will of (23 A.L.T. 37) distinguished - - - - - 681
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— Welch, In re (23 L.J. Ch. 344) followed
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— Winter, In the Goods of (30 L.J.P. & M. 56) distinguished - - - 946
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— Wiseman *v.* Collector of Imposts (21 V.L.R. 743) applied - - - 161
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— Wright *v.* Trenchard (1 A.L.R. 22) followed - - - - - - 536
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— Young *v.* Grote (4 Bing. 253) followed 804
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CHILD—Custody of—Power to demand back child boarded out—Religion of parent—*Habeas corpus* - - - 685
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CLAIMS AGAINST THE COMMONWEALTH ACT 1902—(*No.* 21 *of* 1902)—*Operation and effect of—Action of tort against the Commonwealth—Negligence of servants of Commonwealth—Respondent superior—Cause of action.*] The *Claims against the Commonwealth Act* (No. 21 of 1902) is not merely a procedure Act, nor is it retrospective in its operation. Where A. had, prior to the coming into force of the above Act, sustained injuries through the negligence of the servants of the Commonwealth:—*Held*, that no action lay against the Commonwealth in respect of such injuries, even after the Act came into force. GYTON *v.* OUTTRIM - - - 646

CLUB — Certificate to — Refusal to grant—Special case—Application for special case—Practice - - - - 257
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—— Salary of member of Parliament—Interference by State with Federal instrumentalities—Salary earned in Victoria—Divisibility of - - - 748
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COMMONWEALTH CONSTITUTION ACT—63 *&* 64 *Vict.*, *c.* 12, *ss.* 53, 54, 55—"*Laws imposing taxation*" — *Commonwealth Customs Act* 1901 (1 *Ed. VII.*, *No.* 6), *Part VIII.*—*Id.*, *ss.* 234, 236, 255 — *Commonwealth Customs Tariff Act* 1902 (2 *Ed. VII.*, *No.* 14), *ss.* 2, *etc.*—*Effect of incorporation in of Customs Act—False entry—Genuine invoice—Belief—Penalty—Justices Act* 1890 (*No.* 1105), *ss.* 141, 146—*Appeal—Order to review—Jurisdiction of State Court.*] Sec. 55 of the *Commonwealth of Australia Constitution Act* provides that "laws imposing taxation shall deal only with the imposition of taxation and any provision therein dealing with any other matter shall be of no effect":—*Held*, by MADDEN, C.J., that the words "laws imposing taxation" in that section mean "laws for the purpose of imposing taxation"—that is, laws whose object is to impose a tax, whether at the moment, or in the future, or conditionally in the future:—*Held also*, that secs. 138, 139, 140, 144, and 148, and, *semble*, sec. 141, of the *Commonwealth Customs Act* (No. 6 of 1901) are "laws imposing taxation" within the meaning of sec. 55 of the Constitution; that secs. 183, 234, 236, and 255 of the *Customs Act* are provisions dealing with matters other than the imposition of taxation; and that consequently these sections and all other provisions of the *Customs Act* dealing with matters other than the imposition of taxation are void and of no effect:—*Held further*, that, although, as a result, sec. 248 of the *Customs Act*, which gives a right of appeal from a conviction under the Act by a court of petty sessions, is void and of no effect, nevertheless secs. 141 and 146 of the *Justices Act* 1890 (No. 1105), inasmuch as they give the Supreme Court of Victoria power (on the return of an order *nisi* to review) to quash any order of a court of petty sessions for want of jurisdiction, or on the ground that in law it ought not to have been made, apply to the case of an order made by a Victorian court of petty sessions under the supposed authority of secs. 234 and 245 of the *Commonwealth Customs Act*, and therefore that such an order is reviewable by the Supreme Court of Victoria. A declaration "that the invoice produced is the only invoice . . . . and that the value of the goods mentioned therein is to the best of my belief the fair and real market value of the goods . . . . and that the price paid or to be paid for such goods and stated in the said invoice is the usual and ordinary price paid for such goods" is an absolute statement by the declarant of the usual and ordinary price paid for such goods, and not a statement of the declarant's belief as to such price merely. STEPHENS *v.* ABRAHAMS - - - 901

2. —— 63 *&* 64 *Vict.*, *c.* 12, *ss.* 53, 54, 55—"*Law imposing taxation*"—"*Other matter*"—*Commonwealth Customs Act* 1901 (1 *Ed. VII.*, *No.* 6), *Part VIII.*—*Ib.*, *ss.* 183, 234, 236, 245, 255—*Validity of Commonwealth Customs Tariff*

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COMMONWEALTH CONSTITUTION ACT—*continued.*

Act 1902, 2 *Ed. VII., No.* 14, *s.* 2, *etc.—Effect of incorporation in of Customs Act—False entry—Penalty—Order to review.*] Part VIII. of the *Commonwealth Customs Act* 1901 is not a "law imposing taxation" within the meaning of sec. 55 of the Constitution. "Other matter" in sec. 55 means matter foreign to the imposition of taxation:—*Quære*, whether, even if Part VIII. of the *Customs Act* were a "law imposing taxation," the provisions of secs. 234, 236, 245, or any of them, are "other matter" within the meaning of sec. 55:—*Per* HOOD, J. The expression "law imposing taxation" is a special phrase relating to a particular constitutional class of law, and is not to be read so as to include any and every section which increases the orbit of taxation. *Stephens* v. *Abrahams* (*supra*, p. 201) overruled. *Powell* v. *The Apollo Co.* ([1885] 10 App. Cas. 282) distinguished. STEPHENS *v.* ABRAHAMS **(No. 2)** - - 229

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—— Sale of land—Time the essence of the contract—Payment by instalments **541**
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CONFLICT OF LAWS—*Private International Law—Movables—Mortgage executed out of Victoria of goods in Victoria—Lex situs—Lex domicilii—Companies Act* 1896 (*No.* 1482), *s.* 53—*Companies Act* 1900 (*No.* 1699), *s.* 13.] Goods in Victoria in the possession of the defendant, which was a company domiciled in England, were seized under a warrant of execution issued in Victoria, and were claimed by W. under a mortgage by the defendant company executed in England some years previously and not registered in Victoria:—*Held*, that title to the goods was to be made according to the law of Victoria, and that therefore the mortgage by the defendant company, not being registered in Victoria as required by sec. 53 of the *Companies Act* 1896 and sec. 13 of the *Companies Act* 1900, was invalid and inoperative in Victoria, and gave W. no title to the goods. HOCKEY *v.* THE MOTHER O' GOLD CONSOLIDATED MINES LIMITED; WEDERELL, CLAIMANT **196**

CONSENT ORDER—Ignorance of fact—Judgment by consent—Jurisdiction to set aside - - - - - - **355**
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CONSTABLE OF POLICE—Warrant for stealing—Property in possession of constable—Authority of constable **144**
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See INCOME TAX.

CONTRACT — Agent — Sale of land—Authority of agent—Reasonable and proper contract—Conditions of sale
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—— Breach of—Interference with employment—Coercion of employer—Trades union - - - - - - **475**
See ACTION, CAUSE OF.

—— Sale of goods—Contract for hiring—Payment by instalments—Arrears - **743**
See HIRING AND PURCHASE.

—— Service—Employment of agent—Determination of contract—Commission—Future commission - - - **447**
See MASTER AND SERVANT.

CONVICTION—Drawing up conviction—Amendment of—Obstructing footway—Constable, authority of to prosecute - - - - - - - **152**
See JUSTICES. 4.

CORPORATION—*Corporation created by Statute—Grant incompatible with objects of corporation—Works unnecessary for the primary purposes of corporation—Authority of statutory corporation to spend its funds—Trustees vested with land for public purposes—Dedication of highway—Melbourne Harbor Trust Act* 1890 (*No.* 1119), *ss.* 4, 48, 54, 96, 107, 118—*Melbourne Harbor Trust Act* 1890, *No.* 2 (*No.* 1182), *s.* 8, *Eighth Schedule.*] A body created by Act of Parliament cannot grant to anyone any right incompatible with the main object which the Legislature had in view in creating it, and cannot impose upon its revenues the burden of maintaining, for the benefit of strangers, works not necessary for the primary purpose of the statutory creation, unless specially authorized. Trustees in whom land is vested for public purposes may dedicate portions thereof to the use of the public as a highway only so far as such use be not inconsistent with the purposes for which the land is vested in them. *Rex* v. *Leake* ([1833] 5 B. and Ad. 469) and *Great Western Railway Co.* v. *Solihull Rural Council* ([1902] 86 L.T. 852) followed:—*Held*, that, under the provisions of the *Melbourne Harbor Trust Act* 1890, the Trust had no power to dedicate to the public use a pontoon bridge across the entrance to a

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CORPORATION—*continued.*

dock under its control and management. CLARK AND SON PROPRIETARY LIMITED *v.* THE MELBOURNE HARBOR TRUST COMMISSIONERS 467

***CORPUS* OF ESTATE**—Breaking in on for maintenance — Urgency — Past maintenance - - - - - - 270
See INFANTS.

COSTS—*Practice — Taxation — Costs incurred before notice of claim—Costs incurred before issue of writ—Solicitor's charge for looking up authorities—Discretion of taxing officer—Order LXV., r.* 27 (9).] Costs incurred before notice of an intended claim has been served upon a defendant cannot be allowed upon taxation as between party and party. Costs incurred by a defendant after notice of intended claim, but before the issue of a writ in an action, may be allowed upon taxation as between party and party, so far as the taxing officer considers that they would have been properly charged for and ought to have been allowed if they had been incurred after the commencement of the action, and that they were costs necessarily incurred for the purpose of procuring evidence which could not otherwise have been obtained. The taxing officer has a discretion to allow a solicitor's charge for looking up authorities in a case in which counsel is employed. Taxing officer's discretion under Order LXV., r. 27 (9), considered. THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED *v.* THE COLONIAL MUTUAL FIRE INSURANCE COMPANY LIMITED - - - - - - 427

2. —— *Receiver, costs of fixing remuneration of—Costs "properly incurred."*] In a partnership action in which a receiver had been appointed an order was made allowing the receiver all his costs "properly incurred," including the costs of settling his remuneration. The amount of the remuneration was fixed by the Chief Clerk after a prolonged hearing. Upon the taxation of the receiver's bill of costs the taxing officer allowed costs upon the scale between party and party only :—*Held*, upon a review of taxation, that under the order the receiver was not restricted to costs as between party and party, but was entitled to all costs *properly* incurred. PRICE *v.* PRICE - 719

3. —— *Solicitor conducting his own litigation —Taxation.*] Where a solicitor himself conducts his own litigation, he is entitled to include in his bill of costs profit costs as such solicitor, although prior to the commencement of the litigation he was not holding himself out as a solicitor or practising as one. OGIER *v.* NORTON - - - - - - - - - 536

4. —— *Taxation — Attorney — Charges for non-professional work—Solicitor doing work of estate agent—Jurisdiction of taxing officer to tax —Applicability of scales of costs—"Causes and matters"—"Rules of the Supreme Court* 1884 *" —Order LXV., r.* 8, *App. N.—Supreme Court Act* 1890 (*No.* 1142), *s.* 3.] A taxing officer has no jurisdiction to tax charges made in a bill of costs of an attorney for work not properly that of an attorney. No charge as attorney can be made for work which is purely that of an estate agent. Where a taxing officer has to tax matters not covered by Appendix N. to the "Rules of the Supreme Court 1884," he is not bound to apply the schedules of costs in that appendix. IN RE RIDGEWAY AND IRWIN - - - - - - - - - 138

5. —— *Taxation—Bill of costs—Proceedings before Chief Clerk—Allowance of two counsel—Increased fees—Attendance of plaintiff as witness, allowance for—Instructions for brief—"Rules of Supreme Court* 1900 *"—Order LXV., r.* 28.] In proceedings before the Chief Clerk, the allowance of two counsel, even on a taxation as between solicitor and client, should not be recognized except in cases of real magnitude. Where, in proceedings before the Chief Clerk, there is a protracted inquiry extending over many days, counsel may properly be allowed increased fees, but such increased fees must be regulated upon the same calculation as to time as refreshers in an ordinary action. A plaintiff, being the executor under the will of a person whose estate was being claimed against upon an alleged liability as a contributor on the B list of a company in liquidation, will not be allowed costs of attending from day to day in the hearing of such claim before the Chief Clerk, even although he may be briefed as a witness. The item "instructions for brief" discussed. TUCKER *v.* MULLIGAN - - - - - 123

6. —— *Taxation—Bill of costs — "Instructions for brief"—Two counsel, allowance of in motions.*] On a motion to the Court the taxing officer may in his discretion allow the fees of two or more counsel. There is no practice of the Court to disallow fees to two counsel on a motion to the Court. Headnote to *Baxter v. Hill & Christie* ([1896] 18 A.L.T. 33) disapproved of. The item "instructions for brief" is allowable on taxation as between party and party in a proceeding by way of motion to the Court. IN RE JAMES MCEWAN AND CO. LIMITED - - - - - - - - - 114

—— Bill of costs—Right of client to demand
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—— Charges for obtaining probate—Gross or net value—"Property left"—Preparation of statement - - - 791
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—— Costs against the Crown—Information by Attorney-General—Practice - 859
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—— Costs of preparation and filing schedule—Deed of assignment for benefit of creditors — Subsequent insolvency — Rights of trustees under deed - 797
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COSTS—*continued.*

— Security for—Action by person out of jurisdiction—Order for security 328
See SECURITY FOR COSTS.

COUNTY COURT—*Practice—County Court Act* 1890—(*No.* 1078), *s.* 64—*Action for debt and liquidated demand—Money had and received.*] The plaintiff brought an action against the defendant in the County Court, indorsing his summons as a special summons under sec. 64 of the *County Court Act* 1890. The particulars indorsed on the summons alleged that the plaintiff had been induced by the fraud and misrepresentation of the defendant's agent to enter into a contract, and had paid a deposit of 50*l.*; that the misrepresentations were false, and that the consideration for the deposit had wholly failed, and claimed the return of the 50*l.* An alternative claim was added claiming 50*l.* as money had and received. Upon an objection being taken that the claim was not one for a debt or liquidated demand within the meaning of sec. 64:—*Held*, that the particulars disclosed circumstances which amounted to a claim for money had and received, and that the alternative claim did not alter the nature of the preceding claim, and that therefore the action was for a liquidated debt or demand within sec. 64 of the *County Court Act* 1890. HORRIGAN *v.* MCPHERSON - - - - - 139

2. —— *Act* 1890 (*No.* 1078), *s.* 64—*Special summons—Claim for use and occupation—Debt or liquidated demand.*] An action for use and occupation may be commenced by special summons under sec. 64 of the *County Court Act* 1890. *Rock Freehold Land Company v. Cunliffe* ([1894] 20 V.L.R. 328) overruled. BEECH *v.* POTTER - - - - - - 330

CREATION OF NEW BENEFICIAL INTERESTS—Settlement made under authority of will—Deed of settlement
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CRIMINAL LAW — *Crimes Act* 1891 (*No.* 1231), *s.* 17—*Abduction with intent to unlawfully and carnally know—Materiality of girl's willingness—Misdirection.*] The prisoner was presented under sec. 17 of the *Crimes Act* 1891 for unlawfully taking a girl under the age of eighteen years out of the possession and against the will of her mother, with intent that she should be unlawfully and carnally known by him. The presiding Judge directed the jury "that the girl's willingness to go with the accused was immaterial, and that the section was meant to preserve the parents' control over a girl who was still under their control, whatever the girl's disposition was," and reserved the question whether his direction was right:—*Held*, that the direction was insufficient, and new trial ordered. *Reg.* v. *Biswell* ([1847] 2 Cox. C.C. 279) and *Reg.* v. *Mankleton* ([1853] Dearsley C.C. 159) disapproved of. *Reg.* v. *Henkers* ([1886] 16 Cox. C.C. 257) and *Reg.* v. *Olifier* ([1866] 10 Cox C.C. 402) approved and followed. REX *v.* MACKNEY - - - 22

2. —— *Larceny — Fixtures — Detachable amalgam plates—Larceny at common law—Crimes Act* 1890 (*No.* 1079), *ss.* 97, 307.] A. was presented and convicted of feloniously receiving, knowing the same to have been feloniously stolen, a copper plate, which was an essential part of an undoubted fixture (a ripple table), but was for its complete use intended to be and was in fact periodically detached:—*Held:* (*a*) That the plate was itself a fixture, and therefore could not be the subject of larceny at common law. (*b*) That the conviction for receiving must be quashed:—*Semble* (*per* MADDEN, C.J.) The conviction could not be sustained under secs. 97 and 307 of the *Crimes Act* 1890. REX *v.* DOWSEY - - - - - - 453

3. —— *Letter demanding money with menaces—Reasonable and probable cause—Opinion and belief of the prisoner—Crimes Act* 1890 (*No.* 1079), *s.* 113.] The words "without any reasonable and probable cause" in sec. 113 of the *Crimes Act* 1890 apply to the demand of money, etc. *Reg.* v. *Hamilton* ([1843] 1 C. & K. 212) followed. To entitle a prisoner to be acquitted on a charge, under sec. 113 of the *Crimes Act* 1890, of "sending a letter demanding money with menaces and without any reasonable and probable cause," the jury should find that there was in their opinion reasonable and probable cause for the demand, and that the prisoner honestly believed that there was a proper demand. *Reg.* v. *John Chalmers* ([1867] 10 Cox. C.C. 450) followed. *The Queen* v. *Nathalie Miard* ([1844] 1 Cox. C.C. 22) not followed. REX *v.* CRAIG - - - - - - - 28

—— Intent to commit a felony—Place of public resort—Ramp leading to railway platform - - - - - - 789
See POLICE OFFENCES ACT.

CROWN—*Costs—Power to award costs against the Crown — Crown Remedies and Liability Act* 1890 (*No.* 1080), *Part I.—Information by the Attorney-General — Order for costs made without jurisdiction—Taxation.*] There is no power to order the Crown to pay the costs of a successful defendant in an information by the Attorney-General under Part I. of the *Crown Remedies and Liability Act* 1890. Where such an order had been erroneously made on the hearing, and there had been no appeal:—*Held*, that the defendants were entitled on taxation of their costs to be allowed as against the Crown such costs, charges, and expenses as had been reasonably incurred in connection with a commission to take evidence in England, and that these included the costs of proceedings before the English Courts for the determination of questions arising during the taking of evidence under the commission. THE KING *v.* AUSTIN - - - - - - - - 859

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—— Time running against the Crown—Adverse possession — Limitation of action—Crown licence followed by grant 692
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CROWN LANDS — Grazing area — Trespass upon—Driven sheep—Notice - 641
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—— Licensee of—Power to create easement—Flow of water—Acquiescence - 32
See Water.

CRUELTY—Injury to mental health—Judicial separation - - - - 732
See Husband and Wife.

CUSTOMS—*Commonwealth Customs Act* 1901 (*No.* 6), *ss.* 234 (*a*), (*e*), 251—*Invoice for goods referring to enclosure of other goods—Customs entry omitting reference to enclosure—Declaration — Untrue statement — Evasion of duty—Amendment of information — Alteration of charge.*] The defendant firm imported from its London house 5 bales of carpets and floor coverings, on the invoice for which was the memorandum "Parcel enclosed for X. from Y.," X. being the representative of the firm in Melbourne. The shipping clerk of the defendant firm presented at the Customs House an entry relating to "5 bales of carpets and floor coverings," and giving all the required particulars in regard to them, but making no reference at all to the enclosed parcel; and in a declaration in the form required by the regulations stated, "I further declare that the said goods are properly described in this entry and that the particulars herein given are true in every respect and in the said invoice and that nothing on my part nor to my knowledge on the part of any other person has been done concealed or suppressed whereby His Majesty the King may be defrauded of any part of the duty lawfully due on the said goods." Subsequently, in applying for delivery of the goods, the shipping clerk drew the attention of the Customs official to the memorandum on the invoice, and the parcel was found to contain three suits of clothes, a post entry in regard to which was then made, and the duty short, amounting to 2*l.* 10*s.*, paid. The defendant was charged with making a statement which was untrue in certain particulars, contrary to sec. 234 (*e*) of the *Customs Act* 1901:—*Held*, that the defendant firm was guilty of the offence charged:—*Held further*, that the magistrate before whom the information was heard was bound, if it became necessary, to amend the information so as to charge the defendant firm with having evaded the payment of duty, and that the defendant firm was guilty of such offence. Christie *v.* Templeton - - 350

—— (*Commonwealth*) — Invalidity of parts—Section 55 of the *Commonwealth of Australia Constitution Act* 201, 229
See Commonwealth Constitution Act

CUSTOMS AND EXCISE DUTIES ACT 1890—*Act No.* 1082, *s.* 155—*Sale of liquor without a licence—Complaint for goods sold and delivered—Defence of illegality, onus of proof of.*] By sec. 155 of the *Customs and Excise Duties Act* 1890 it is provided that it shall not be lawful for a person to sell "spirits, wine, or fermented liquor," unless such person holds a licence authorizing such sale. In a claim for goods sold and delivered, such goods consisting of spirits and wine, at the close of the complainant's case the defendant raised the point that no licence authorizing the sale of such liquors had been proved, and he asked for judgment:—*Held*, that the sale of spirits and wine was unlawful only when the facts rendering it illegal had been proved, and that it was for the defendant to prove such illegality. Twomey *v.* O'Brien 729

DAM IN WATERCOURSE—Erection of—Riparian owners—Right to preserve bed of stream—Weir—Erosion of bed
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DAMAGES, LIABILITY FOR—Insufficient drain—Liability of municipal council—Nuisance - - - - - 308
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DEBENTURES—"Goods and chattels"—13 Eliz., c. 5 - - - - - - 102
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DEBT OR LIQUIDATED DEMAND—Specially indorsed writ—Final judgment—Contract for sale of land—Deposit 601
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DEBTS — Assignment of debt — Equitable assignment — Promise by debtor of assignor to pay future debt—*Book Debts Act* 1896 - - - - 550
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DEDICATION OF HIGHWAY—Corporation created by Statute—Dedication incompatible with objects of corporation
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DEDUCTIONS FROM INCOME—Travelling expenses — Income-earning businesses
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DISSOLUTION OF MARRIAGE — Discretionary bar to decree—Adultery of petitioner - - - - - 442
See DIVORCE. 2.

DIVIDENDS ON SHARES—Liability of beneficiary to income tax - - - 525
See INCOME TAX. 3.

DIVORCE—*Marriage—Nullity suit—Prohibited degrees of affinity.*] The marriage of a man with the daughter of the sister of his deceased wife is null and void. SMITH *v.* SMITH - - 98

2. —— *Marriage Act* 1890 (*No.* 1166), *ss.* 74, 83, 86—*Discretionary bar—Consolidating Acts, effect of.*] Sec. 86 of the *Marriage Act* 1890, which empowers the Court in its discretion under certain circumstances to refuse to grant a decree of dissolution of marriage, applies to all decrees of dissolution under the Act. DUNCAN *v.* DUNCAN - - - - - - - 442
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ENGLISH BANKRUPTCY ACT 1883 — Trustees under—Right to sue in Victoria—"Goods and chattels"—Debentures - - - - - - 102
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EVASION OF DUTY—Untrue statement—Declaration -Entry omitting reference to enclosed parcel - - - 350
See CUSTOMS.

EVIDENCE — *Uncontradicted evidence disbelieved by magistrates—Duty of magistrates—Claim by wife to household goods.*] Where facts, which might have occurred, are sworn to have in fact occurred, and the evidence is uncontradicted, magistrates are bound to find in accordance with such evidence, however much they may suspect it. *Dulon* v. *Roberts* ([1890] 11 A.L.T. 168) referred to on the question of a wife's claim to goods ostensibly belonging to her husband. STEPHENS *v.* MCKENZIE; MCKENZIE, CLAIMANT - - - - - - - 652

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—— Effect of—Register of land tax—Sale of part of landed estate — Notice to registrar - - - - - - 949
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EXECUTORS, DUTIES OF—*Legacies charged upon specifically devised real estate—Personal estate insufficient to pay legacies—Duty of executors to sell real estate to pay legacies—Costs.*] Under the *Administration and Probate Act* 1890 it is the duty of executors, where the personal estate is insufficient to pay legacies which are charged upon specifically devised real estate, to sell such real estate in order to pay such legacies. Legatee succeeding in a claim for payment of legacy in a certain priority allowed costs out of the general estate. GRAY *v.* GRAY [1000

EXEMPLIFICATION OF PROBATE—Probate granted in other States to three executors' application for re-sealing by one - - - - - - - - 681
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FOREIGN DEBTOR — Foreign creditor — Promise by debtor of assignor to pay future debt—*Book Debts Act* 1896 *See* ASSIGNMENT OF DEBT. [550

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FRAUDS, STATUTE OF—Part performance—Parol promise to leave property in consideration of marriage - - 640
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FRIENDLY SOCIETY—*Act* 1890 (*No.* 1094), *ss.* 4, 5, 13, 20—*Friendly Societies Act* 1891 (*No.* 1232), *s.* 12—*Rules and amendments informally made—Effect of registration of—Dispute between member and society—Jurisdiction of Supreme Court — Parties — Non-joinder of.*] The acknowledgment of registry of an amendment of a rule of a friendly society, issued under sec. 13 (5) of *The Friendly Societies Act* 1890, is conclusive evidence that such amendment has been duly made, as well as that it has been duly registered. A provision in the rules of a friendly society that "all disputes between a member or person claiming through a member or under the rules of the society and the society or any officer thereof shall be decided by" the governing body of the society does not oust the jurisdiction of the Supreme Court in an action by a member in which the complaint is that the defendants, acting under certain amended rules purporting to have been made by the society, but which the plaintiff alleges to have been illegally made, have usurped the control of the business, funds, and property of the society. In such an action, as the society may be interested in maintaining the validity of the amended rules, it or some one representing it should be joined either as a plaintiff or defendant. BROSNAN *v.* TRAIT 220

GAMING AND WAGERING—*Street Betting Suppression Act*—Evidence—Conduct showing purpose - - - 655
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GAS MAINS — Connection with sewered properties—Sewered and unsewered properties—Rates - - - 340
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GENERAL SESSIONS—Appeal to—Reasonable time for appeal—Delay—Order for pre-maternity expenses - 562
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GIFT OF PROPERTIES IN LIFETIME—Probate duty—Whether transferred properties to bear duty or estate 814
See ADMINISTRATION AND PROBATE ACT 1890. 3.

GOLD BUYERS ACT 1901—(*No.* 1780), *ss.* 3, 8—*Buying unwrought gold without a licence—Information—Sufficiency of—Person from whom gold bought—Striking out information—Order to review.*] In an information under sec. 3 of the *Gold Buyers Act* 1901 for buying gold without a licence, it is not necessary to state from whom the accused is alleged to have bought. A. was charged simply with buying unwrought gold without being licensed so to do. The magistrates, before any evidence was taken, required the prosecution to state from whom accused was alleged to have bought, on the ground that

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GOLD BUYERS ACT 1901—*continued.*

in the absence of such information he would be prejudiced in his defence. The prosecution refused to give the information required, and the magistrates thereupon struck out the case:—*Held*, that they were wrong in so doing. GIBSON *v.* LEE SUEY - - - - - 418

GOODS, DESCRIPTION OF—Trade description—"Get up" common to the trade—Labels, etc., calculated to deceive *See* TRADE MARKS. 2. [182

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HABEAS CORPUS—Child boarded out—Power to demand back child—Regulations - - - - - - - 685
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HARBOUR TRUST ACT 1890—Dedication of highway—Pontoon bridge—Trustees vested with land for public purposes *See* CORPORATION. [467

HEALTH—*Health Act* 1890 (*No.* 1098), *ss.* 43, 61, 71—*Adulteration—Purchase for analysis—Purchase of three bottles of the same article—Admixture and subdivision into three parts—"Any article"—Compliance with statutory provisions.*] The informant purchased in the defendant's factory three bottles of raspberry vinegar manufactured by the defendant, intimating his intention of having the vinegar analyzed. He opened the bottles, mixed their contents, and rebottled the mixture into three bottles, each of which was marked and sealed, and one was delivered to the vendor, one to an analyst, while the third was retained by the informant:—*Held*, that there was but one purchase of a quantity of one article of food, and that sec. 61 (*a*) of the *Health Act* 1890 had been complied with. *Mason* v. *Cowdary* ([1900] 2 Q.B. 419) and *Fecitt* v. *Walsh* ([1891] 2 Q.B. 304) discussed and distinguished. ROCHE *v.* LAVIS - 394

2. —— *Act* 1890 (*No.* 1098), *ss.* 194, 196, 197, 198, 199, 204, 214—*Vaccination—Information for failure to have child vaccinated—Defence—Certificate of vaccination after information lodged.*] The production of a certificate of successful vaccination is a sufficient defence to an information under Part IX. of the *Health Act* 1890 for failing to have a child vaccinated even though such certificate was obtained and such vaccination took place not only after the expiration of six months from the birth of the child, but after the information was lodged. The defendant was the father of a child which

HEALTH—*continued.*

was born on 13th May 1902. No steps were taken to have the child vaccinated until 7th October 1903, when a certificate of unfitness, in the form of Schedule XV., was given by a medical practitioner, postponing vaccination till 7th December 1903. An information for failure to have the child vaccinated was lodged and issued on 9th October 1903, the hearing of which was adjourned till 11th January 1904. On 8th December the child was successfully vaccinated by a medical practitioner, who on 14th December gave a certificate to that effect in the form of Schedule XVII.:—*Held*, that the production of this last-named certificate at the hearing was a good defence to the information. AKEROYD *v.* PHILLIPS - - - 662

HIGHWAY, DEDICATION OF—Dedication incompatible with objects of corporation—Trustees invested with funds for public purposes - - - - 467
See CORPORATION.

HIRING AND PURCHASE—*Agreement for purchase—Hirer to pay monthly rent till total sum paid—Absolute contract to purchase—Arrears of instalments—Use and hire—Form of action—Jurisdiction of justices.*] Under a purchase and hiring agreement relating to an organ, the hirer agreed to pay a deposit, and to pay 11*s.* every month "during the continuance of the contract," and that as soon as the hirer had paid the total sum of 27*l.* 10*s.* the organ should become his absolute property:—*Held* an absolute contract to purchase, and consequently the instalments could not be recovered as use and hire, although so designated in the agreement, nor was the amount of such instalments recoverable as for goods sold and delivered, because the property in the article still remained in the vendor. SUTTONS PROPRIETARY LIMITED *v.* RICHARDS - - 743

HUSBAND AND WIFE—*Judicial separation—Cruelty.*] In a suit for judicial separation on the ground of cruelty a decree may be granted where the evidence, though not proving bodily injury, shows injury to the petitioner's mental health. STONEHAM *v.* STONEHAM - - 732

2. —— *Order for maintenance—Resumption of cohabitation for a time—Disobedience of order for maintenance—Marriage and Matrimonial Causes Act* 1864 (*No.* 268), *ss.* 30, 31—*Marriage Act* 1890 (*No.* 1166), *ss.* 42, 43, 51.] In 1889 an order was made against a husband under sec. 31 of the *Marriage and Matrimonial Causes Act* 1864 (now sec. 43 of the *Marriage Act* 1890) directing him to pay the sum of 10*s.* weekly for the maintenance of his wife, on the ground that he had deserted her and left her without means of support. In 1895 the husband cohabited with his wife for about a month, during which time he maintained her. The husband then again deserted his wife, but continued to pay her 10*s.* a week until December 1902, when the payments altogether

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HUSBAND AND WIFE—*continued.*

ceased :—*Held*, that the order for maintenance was annulled by the subsequent resumption of cohabitation, and that therefore the wife could not succeed in proceedings against her husband under sec. 51 of the *Marriage Act* 1890 for disobedience of such order. ROBERTS *v.* ROBERTS - - - - - - - - 158

—— Claim by wife to goods seized in execution —Onus of proof - - - 652
See EVIDENCE.

—— Marriage — Nullity suit — Prohibited degrees of affinity - - - 98
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—— Policy for benefit of wife—Death of wife before husband — Resulting trust—Marshalling - - - - 263
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ILLEGALITY, DEFENCE OF—Sale of liquor without a licence—Proof of defence—Onus of proof - - - - 729
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ILLEGITIMATE CHILD — Order for maintenance of—Failure to pay—Action against executors of father—Arrears
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IMMIGRATION RESTRICTION ACT 1901 (*Commonwealth*)—*No.* 17 *of* 1901—*S.* 3 (*a*)—*Dictation by officer of passage of fifty words.*] By sec. 3 (*a*) of Act No. 17 of 1901 it is provided "that any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer" is a prohibited immigrant :—*Held*, that in order to obtain a conviction under this section it is essential that a passage of fifty words, neither more nor less, should be dictated ; and that where the officer stopped after reading ten words out, being satisfied that the immigrant did not understand what was being read to him, and had not attempted to write any of the ten words so dictated, no offence was committed. CHRISTIE *v.* AH FOO - - - - - - - - 533

IMPRISONMENT OF FRAUDULENT DEBTORS ACT 1890—*Part III.—Service of order for payment—Justices Act* 1890, *s.* 23—*Personal service.*] Before proceedings can be taken under Part III. of the *Imprisonment of Fraudulent Debtors Act* 1890, upon an order for payment of money made by a Court of Petty Sessions, the order or a copy thereof must be served upon the debtor in person. Service on the debtor by delivering it to another person in the manner prescribed for the service of a summons by sec. 23 (1) of the *Justices Act* 1890 is insufficient. WARD *v.* MILLER - - - - - - - - 997

INCOME TAX—*Constitutional law—Commonwealth and State authority—Interference by State with Federal instrumentality or agency—Salary or allowance of member of Commonwealth Parliament—Salary or allowance of Commonwealth Minister of the Crown—Salary for work done in buildings exclusively vested in the Commonwealth—Liability to taxation by State Legislature—Income tax—Salary earned in Victoria—Divisibility of salary for purposes of Income Tax Acts—Income earned, but not yet received—Income Tax Act* 1895 (*No.* 1374), *s.* 2, 7 (1) (*a*), 14—*Commonwealth of Australia Constitution Act* (63 *&* 64 *Vict.*, *c.* 15), *ss.* 48, 66.] The salary or allowance of a member of the Commonwealth Parliament is liable to income tax under the Victorian *Income Tax Act* 1895 so far as it is earned in Victoria. Section 7 (1) (*a*) of the Victorian *Income Tax Act* 1895 does not exempt from taxation the salary or allowance of a Commonwealth Minister of the Crown, but such salary or allowance is liable to income tax under such Act so far as it is earned in Victoria. Income tax is payable under the *Income Tax Act* 1895 only upon the amount of income which has been actually received by the taxpayer during the taxable year, and not upon money earned by, but not paid to him, during such year. *In re the Income Tax Acts* (No. 4) : *Wollaston's Case* (28 V.L.R. 357) followed. *D'Emden* v. *Pedder* ([1904] 1 C.L.R. 91) distinguished. The *dicta* of the High Court of Australia in *D'Emden* v. *Pedder* (1 C.L.R. 91) as to the applicability of the United States decisions to the interpretation of the *Commonwealth of Australia Constitution Act* not followed ; but the principle of the decision of the Privy Council in *Bank of Toronto* v. *Lambe* ([1887] 12 App. Cas. 575, at p. 587) applied. IN RE THE INCOME TAX ACTS (No. 4). DEAKIN'S AND LYNE'S CASES - - 748

2. —— *Act* 1895 (*No.* 1374), *s.* 9, *sub-ss.* 1, 2 (*g*) (*h*), *and* 4—*Deductions—Travelling expenses to and from place of residence and business from and to another place of business—Travelling expenses of director of company—Land with improvements thereon used for the purpose partly of gain and partly of residence—Liability to tax—Estimate by Commissioner of capital value of portion used for residence.*] The expenses incurred by a taxpayer in periodically travelling backwards and forwards between one place, where he both resides and carries on business, and other places where he carries on business, solely for the purpose of earning the profit derived from the trade carried on at the latter places, may be deducted from the taxable income earned therefrom : — *Per* HOLROYD, A'BECKETT, and HODGES, JJ. (the latter doubting). The expenses incurred by a taxpayer in periodically travelling backwards and forwards between one place where he both resides and carries on business and another place for the purpose of attending meetings of directors at the latter place, and of earning

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INCOME TAX—*continued.*

fees payable to him periodically for acting as such director, may be deducted from the taxable income earned by him as such director. Where a portion of land was used for the purposes of a trade, and a portion of the dwelling-house erected thereon was used for the purpose of doing the clerical and managerial work in connection therewith, while the remaining portions both of the land and the dwelling-house were used for the purposes of residence and enjoyment:—*Held*, that the actual capital value, as estimated by the Commissioner of Taxes, of the portions used for the purposes of residence and enjoyment was liable to income tax at the rate of 4 per cent. per annum. IN RE THE INCOME TAX ACTS - 298

3. —— *Act* 1896 (*No.* 1467), *s.* 12—*Income Tax Act* 1903 (*No.* 1819), *s.* 9 (2)—*Income—Dividends on shares in company—Liability of beneficiary.*] Income arising from dividends on shares in a company registered under Part II. of the *Companies Act* 1890, and not carrying on mining operations in Victoria, is not taxable under the *Income Tax Acts*, either in the hands of the trustee or of beneficiaries. IN RE INCOME TAX ACTS (No. 2) - - - - - 525

4. —— *Act* 1895 (*No.* 1374), *ss.* 2, 9 (11)—"*Income from personal exertion*"—*Bonus voted from year to year by company to employé—Reward for personal services—Continuity of payment—Probability of recurrence—"Granted secured or allowed.*"] A. had been managing director of a company for 16 years at a salary of 600*l.* per annum, and during each such year there had been voted to him by a resolution of the shareholders at the annual general meeting of the company the sum of 250*l.* as a bonus:—*Held*, that the Commissioner of Taxes rightly assessed the sums so received during the last four years as being income derived from personal exertion, and subject to income tax. It is not necessary that a "bonus" should have been received under an express agreement that it should be part of the payment for personal exertion in order to render it liable to income tax. Section 9, sub-sec. 11, of the *Income Tax Act* 1895 covers all payments for services rendered by personal exertion; and where such payments are of a recurring nature they are liable to income tax. IN RE THE INCOME TAX ACTS (No. 3) - - - 735

INFANTS—*Past maintenance—Breaking into corpus—Special circumstances.*] Applications to break into *corpus* for the purpose of past maintenance of infants will be refused unless it be shown that there are some special circumstances explaining why the application was not made before the money was spent, or that the applicant has been compelled by urgency to expend money on maintenance. *In re Welch* ([1854] 23 L.J. Ch. 344) followed. IN RE X. [270

INFANTS—*continued.*

—— Representation of — Originating summons—Direction to trustee to sell—Discretion of trustee—Practice 793
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INFORMATION—Sufficiency of—Striking out information - - - - - 418
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INFORMATION BY ATTORNEY-GENERAL—Practice—Costs against the Crown—*Crown Remedies and Liability Act*
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INFORMER — Right to prosecute — Offence against Act for public protection—"Disease" - - - - - - 18
See VEGETATION DISEASES ACT 1896.

INJUNCTION — Application for — Practice—Damages—Trade description—Use of word "patent" after patent expired—Misconduct—Costs - - - 172
See TRADE MARKS.

INSOLVENCY—*Assignment in trust for benefit of creditors—Trustee's commission—Costs of trustee—Sequestration of assignor's estate—Right of trustee under deed of assignment to deduct from moneys in his hands belonging to insolvent estate—Costs of preparing insolvent's schedule—Rights of assignee in insolvency to money in hands of trustee under deed of assignment—Insolvency Act* 1890 (*No.* 1102), *s.* 71.] The rights to the payment of commission properly chargeable, and of costs and expenses properly incurred, by trustees under a deed of assignment for the benefit of creditors are preserved by sec. 71 of the *Insolvency Act* 1890, and the trustees are entitled, notwithstanding the sequestration of the assignor's estate, to deduct and retain moneys for the payment thereof from the moneys in their hands as such trustees at the date of the sequestration. The costs incurred in the preparation and filing of an insolvent's schedule may be allowed out of the insolvent estate. The assignee or trustee in insolvency has no power to take possession of money in the bank to the credit of the trustees under a deed of assignment for the benefit of creditors made prior to the sequestration of the insolvent estate:—*Semble*, that the Judge of the Insolvency Court has a discretion to allow the payment out of the insolvent estate of any remuneration or expenses not provided for by the *Insolvency Acts*. *In re* WARD-COLE - 797

2. —— *Grocer's license—Action to enforce right to purchase—Order of Court giving option of purchase—Proviso in fraud of insolvency law—Injunction against transfer of grocer's license—Order of Court purporting to bind official assignee in case of insolvency—Property passing to official assignee—Equitable interest in insolvent's property—Official assignee—"Privy."*]

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INSOLVENCY—*continued.*

A., the holder of a grocer's licence, agreed that, should he desire to dispose of the licence, he would give B. the first option of purchasing it for 40*l.* A. attempted to sell the licence to C., whereupon B. brought an action against A. and C. claiming specific performance of the agreement and an injunction to restrain the sale to C. In this action an order of the Court was made by consent ordering that upon payment of the sum of 40*l.* by B. when required to do so by A. his executors or administrators A. his executors administrators or his official assignee D. should he become insolvent" should transfer the licence to B., provided that "if A. should become insolvent B. should be entitled to pay 40*l.* and obtain a transfer of the licence;" and granting a "perpetual injunction against A. his executors administrators or assigns in insolvency should he ever become insolvent" from transferring the licence to any person other than B. A. afterwards became insolvent, and D. was appointed the official assignee of his estate:—*Per* the Full Court (Madden, C.J., Williams and Hood, JJ.), affirming the decision of Hodges, J.:—*Held*, that D. was not bound by any of the provisions of the consent order, as he was neither a party to the action nor a "privy" to a party thereto:—*Held also*, that the proviso for the transfer of the licence to B. on the insolvency of A. was void as against the policy of the insolvency law:—*Held further*, that the whole property in the licence passed to D., and that B. had no equitable interest therein. *Ex parte Mackay* ([1873] L.R. 8 Ch. 643) and *Ex parte Barter* ([1884] 26 Ch. D. 510) followed. Whyte *v.* Williams - 69

3. —— *Insolvency Act* 1890 (*No.* 1102), *s.* 139—*Insolvency Act* 1897 (*No.* 1513), *s.* 10 (1)—*Certificate—Dispensation with condition—Circumstances for which insolvent cannot justly be held responsible—Nature of responsibility—Payment of costs made condition precedent to certificate.*] To entitle an insolvent to dispensation with the condition of payment of 7*s.* in the pound under sec. 139 of the *Insolvency Act* 1890, what must be shown is not the absence of any imprudence leading to his insolvency, but freedom from responsibility for the insufficiency of his assets to pay the statutory amount. Where it was shown that an insolvent never had any assets beyond what he earned as a labourer:—*Held* (by the Full Court, Hodges, J., dissenting), that the Court of Insolvency was justified in dispensing with the statutory condition, although his insolvency has been brought about through his imprudence and temper in breaking a contract. Under the above circumstances, the Court of Insolvency, having found that an opposing creditor was justified in bringing the facts before it, granted the certificate, but made the payment by the insolvent of the creditor's costs a condition precedent to the issue of the certificate:—*Held*, that it had power to do so. Re Harding - - 586

INSOLVENCY—*continued.*

INSPECTION OF DOCUMENTS—Discovery before statement of claim—No affidavit necessary - - - - - - 100
See Practice. 3.

INSPECTION OF MINE—Order for—Jurisdiction of Warden to make second order - - - - - - - 603
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See Hiring and Purchase. [743

INSTRUCTIONS FOR BRIEF—Allowance of—Party and party costs—Motion—Discretion of taxing officer - - 114
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INSTRUMENTS ACT 1890—(*No.* 1103), *s.* 208—*Part performance—Parol promise to leave property by will in consideration of marriage—"Rules of the Supreme Court* 1900"—*Order XIV.* (*a*).] A. verbally promised B. that, in consideration of her marrying him, he would leave her half his real and personal estate by his will. B. thereupon married A., who did not leave half of his property to B. by his will. In an action by B. against the executrix of A., claiming a declaration that A. was bound to leave, by his will, one-half of his property to B.:—*Held*, upon an application by the defendant under Order XIV. (*a*) for judgment, that the marriage was not a sufficient part performance to take the case out of sec. 208 of the *Instruments Act* 1890, and judgment was given for the defendant. Hall *v.* Johnson - - 649

—— s. 208, 209—Sale of land—Authority of agent—Reasonable and proper contract—Conditions of sale - - - 387
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JOINT DEBTORS—Writ of *fi. fa.* issued against one of several joint debtors—Irregularity - - - - - 335
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JUDGMENT, SETTING ASIDE—Consent order—Order not passed and entered—Ignorance of fact—Jurisdiction of Court - - - - - - 355
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JUDICIAL SEPARATION—Cruelty—Injury to mental health - - - 732
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JURISDICTION OF COURT—Arbitration clause—Disputes between members—Offer and refusal to arbitrate - 671
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JURISDICTION OF JUSTICES—Information disclosing no offence—Remand—Action against justices - - - 422
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JURISDICTION, TEST OF—Justices—Action against—Insufficiency of information—Remand - - - - - - 422
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JURY, TRIAL BY — "Causes or matters within the cognizance of the Court in its equitable jurisdiction"—Fraud—Declaration in Equity - - 293
See PRACTICE. 9.

JUSTICES—*Justices Act* 1890 (*No.* 1105), *ss.* 73, 155, 156, 187—*Information disclosing no offence — Remand — Conviction — Jurisdiction—False imprisonment—Action against justice of the peace.*] Where an accused person is brought before a court of petty sessions on information, the fact that the information discloses no offence does not deprive the Court of jurisdiction to remand the accused and detain him until he finds bail for his appearance. Where justices, acting on a mistaken view of the law, upon evidence which is insufficient to prove any offence, convict, and cause to be detained, an accused person who is before them on an information which in fact discloses no offence, they are not liable in an action of false imprisonment as having acted without jurisdiction:—*Per* HOLROYD, J. By sec. 187 of the *Justices Act* 1890 (No. 1105) the justices are legally bound to proceed to hear the information, however defective in form or in substance. They cannot therefore be subjected to any action for so doing:—*Semble*, the test of jurisdiction is whether the justices had power to enter upon the inquiry, and not whether, having done so, they acted rightly in convicting. HITCHEN *v.* PHIPPS - - - 422

2. —— *Justices Act* 1890—(*No.* 1105), *ss.* 40, 77—*Id.* 1896 (*No.* 1458), *s.* 3—*Right of audience—Conduct of prosecution—Power of Court of Petty Sessions.*] Sec. 77 of the *Justices Act* 1890, which gives a right of audience to parties, their counsel or attorneys, in Courts of Petty Sessions, does not preclude justices in Petty Sessions from allowing any person whom they may think fit to conduct a prosecution under special circumstances. *McGrath* v. *Dobie* ([1890] 16 V.L.R. 646) followed. *O'Sullivan* v. *McMahon* ([1896] 22 V.L.R. 55) overruled. RITTER *v.* CHARLTON - - - - - 558

3. —— *Justices Act* 1890 (*No.* 1105), *s.* 85—*Withdrawal of case by complainant—Payment of costs condition precedent—"Order," meaning of.*] A complainant in proceedings before justices has the same right to discontinue or withdraw his case as a litigant in other Courts, but the payment of costs is a condition precedent to such right under sec. 85 of the *Justices Act* 1890. Meaning of "order" discussed. HAYNES *v.* WILLIAMS - - - - - - - 938

4. —— *Police Offences Act* 1890 (*No.* 1126), *ss.* 6, 82, 99—*Local authority—Regulations—Ultra vires and meaningless—Obstructing footway—Authority to prosecute—Justices Act* 1890 (*No.* 1105), *ss.* 77 (15), 141—*Conviction wrongly drawn up—Grounds for setting aside—Amending—Order to review.*] The fact that a conviction, otherwise good, is incorrectly drawn under sec. 77 (15) of the *Justices Act* 1890 is no ground for setting the conviction aside. An order of a court of petty sessions, as pronounced by the chairman, fined a person accused of obstructing the footway 10*s.*, in default 24 hours' imprisonment. The order as drawn up read—"Fined 10*s.*, in default 3 days' imprisonment":—*Held*, that this was not a ground for setting aside the conviction, but only for amending it. Any member of the police force may by virtue of sec. 99 of the *Police Offences Act* 1890 prosecute, without special authority, for a breach of a regulation made by a local authority under sec. 6 of the same Act for preventing any obstruction of the footway. KOETSVELD *v.* PATRICK - - - - - 152

—— Information—Sufficiency of—Striking out information—Practice - - 418
See GOLD BUYERS ACT 1901.

—— Scale of costs — Witnesses' expenses—Allowance of—Rules under *Justices Act* 1890 - - - - - - - 641
See LAND ACT 1901.

—— Summons issued by for desertion of illegitimate child—"Writ of summons issued out of a Court"—Service of [381
See SERVICE AND EXECUTION OF PROCESS ACT 1901. 2.

JUSTIFICATION — Justifying substance of libel — Variation between libel and matter pleaded in justification 722
See PLEADING.

LAND ACT 1901—(*No.* 1749), *ss.* 186, 187, 196—*Driving sheep or cattle across land of any other person—Notice required—Interest in land—Whether grazing licensee entitled to notice—Person possessed of* 500 *sheep—Whether sheep must be on land driven over—Justices Act* 1890 (*No.* 1105)—*Rules under—Witnesses' expenses.*] The words "land of any other person" in sec. 196 of the *Land Act* 1901 (No. 1749) mean land in which another person has an interest, and are not to be confined to land belonging to or the property of some other person:—*Held*, accordingly, that before cattle are driven over Crown lands held by another person merely under a grazing licence, the notice required by sec. 196 must be given. If such person is possessed of 500 sheep he is entitled to the statutory notice although he has no sheep on the land in question at the time of the alleged offence. Justices have no power to allow as witnesses' expenses any amounts other or greater than those set out in the scale provided by the rules under the *Justices Act* 1890. GRAVES *v.* LOVICK - - - - - 641

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LAND AND PREMISES USED FOR RESIDENCE AND BUSINESS—Deductions from income tax—Estimate of capital value of residence - 298
See INCOME TAX. 2.

LAND TAX—*Act* 1890, *ss.* 8, 9, 35, 31, 37, 41—*Liability to land tax—Bare legal owner—Land under Transfer of Land Act* 1890—*Unregistered transfer—Right of transferor to have name removed from Land Tax Register.*] A., whose name was properly on the Land Tax Register in respect of a landed estate, cut up and sold portions of the estate, the titles to which were under the *Transfer of Land Act* 1890, to various purchasers, who paid their purchase-money, and went into possession under their contracts of sale. A. also executed transfers of the land sold, which, by reason of delay in the Titles Office, caused by the discovery of certain errors in the original Government survey, had not been registered. The provisions of secs. 35 and 41 of the *Land Tax Act* 1890 had been complied with so far as was possible in the absence of registration of the transfers:—*Held*, that A. was entitled to have his name removed from the Land Tax Register in respect of the land sold. *The Queen* v. *Blackwood* ([1890] 16 V.L.R. 157) distinguished. EX PARTE HOPE - - 868

2. —— *Act* 1890 (*No.* 1107) *ss.* 3, 35–38, 40–42, *Seventh Schedule—Person properly on the Land Tax Register in respect of land—"Landed estate"—"Land"—Sale of portion of land—Notice to Registrar of sale—Acknowledgment of sale by purchaser—Effect of omission to send notice and acknowledgment—Liability of person on register—Liability in respect of land undisposed of after notice of sale to Registrar—Reclassification and revaluation, necessity for—"Evidence"—Effect of Land Tax Register as evidence—Removal of name from register.*] The respondents were properly placed on the Land Tax Register as the owners of a landed estate comprising 21,894 acres, and as liable to pay the land tax thereon, and a notification to such effect was published in the *Government Gazette* of 13th June 1899. By transfer, dated 16th February 1900, they sold portion of the said estate—viz., 150 acres—which was not, however, removed from the register until October 1903. The respondents did not at any time forward to the Registrar a notice of this sale in the form of the Seventh Schedule to the Act, but duly made demand to have the remaining 21,744 acres reclassified and revalued under the Act, which, however, was never done. Before the expiration of the half-year commencing 28th August 1900 the respondents sold and transferred the whole of the remaining 21,744 acres to another purchaser, and the case as stated admitted that thereupon their liability to tax in respect of the whole estate ceased:—*Held*, that the respondents

LAND TAX—*continued.*

were liable to pay land tax in respect of the whole 21,894 acres for the half-years commencing 28th February 1900 and 28th August 1900. Sec. 41 of the *Land Tax Act* 1890 applies to the case where a person who is properly placed on the Land Tax Register in respect of any land has parted with his interest in part only of such land, as well as to the case where he has parted with his interest in the whole of such land: *The Queen* v. *Gidney* ([1899] 25 V.L.R. 81, 82). So that where part only of the land has been parted with, the liability of such person to land tax in respect of the whole land continues until the notice and acknowledgment contemplated by the section have been forwarded to the Registrar:—*Quære*, whether when such notice and acknowledgment have been given and the name of the transferee of such part of the land has been entered upon the register in respect thereof, the transferor is liable to land tax in respect of the untransferred portion of the land without a fresh classification and valuation thereof in accordance with the Act. THE KING *v.* KING - - - - - - - 949

LARCENY—Fixtures—Chattels—Ripple plates—*Crimes Act* 1890, ss. 97, 307 - 453
See CRIMINAL LAW. 2.

LEAVE AND LICENCE — Crown lands—Licensee of, power to create easement—Natural flow of water—Alteration in features of land—Acquiescence - 32
See WATER.

LEGACIES CHARGED UPON SPECIFICALLY DEVISED REALTY—Personal estate insufficient—Sale of realty to pay legacies - - - - 1000
See EXECUTORS, DUTIES OF.

LEGAL PROFESSION—*Barrister and solicitor—Admission to practice—"Trade or business"—School teacher—Certificate of Board of Examiners—Discretion of Full Court to admit to practice, notwithstanding refusal of certificate by Board—"Rules for Admission of Barristers and Solicitors" of 26th February* 1892: *Rules* 5 *and* 14; *Schedules B. and H.*] The occupation of a school teacher is not a "trade or business" within the meaning of the certificate in Schedule B. of the "Rules for the Admission of Barristers and Solicitors" of 26th November 1892. The Full Court has a discretion, where it thinks that there has been no real breach of the "Rules for the Admission of Barristers and Solicitors" by the applicant, to admit him to practice as a barrister and solicitor, notwithstanding that the Board of Examiners has refused him a certificate under rule 14 of the "Rules for the Admission of Barristers and Solicitors" of 26th November 1892. *In re* EMBLING - - - - - - - - 1

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LEGAL PROFESSION—*continued.*

2. —— *Legal Profession Practice Act* 1891—(*No.* 1216), *s.* 11; 23 *&* 24 *Vict., c.* 127, *ss.* 10–37; 37 *&* 38 *Vict., c.* 68, *s.* 4—"*Rules of Supreme Court, 26th November* 1892," *r.* 18—*Barrister and solicitor—Articled clerk—Leave to carry on permanent occupation during service of articles.*] MADDEN, C.J., granted leave to an *employé* in the Customs Department to continue in that employment during the course of his articles of clerkship to a barrister and solicitor of the Court on being satisfied that such employment would not interfere with the performance of his duties as an articled clerk:—*Quære,* whether there was any power to make the order. *In re* DOUGLAS - - - **943**

LETTERS—Registration of as part of a trade mark — Distinctive device — Added matter - - - - - - **965**
See TRADE MARKS. 4.

LICENSING—*Club—Licensing Act* 1890 (*No.* 1111), *ss.* 3, 4 (8), 58—*Club, certificate to—Second certificate in respect of same premises—Special case—Application for case to be stated.*] A special case cannot be stated in respect of the refusal of the Licensing Court to grant a certificate to a club. A second certificate cannot be granted to a new club in respect of premises for which another certificate has already been granted, and which certificate is still in existence. Where an application in writing for a special case has been made by leaving the same with the clerk of the Licensing Court, and the Licensing Court has stated a special case, that is a sufficient compliance with the provisions of sec. 58 of the *Licensing Act* 1890, although such application has not been made to the Court itself while sitting as a Court. IN RE CITY TATTERSALL'S CLUB, EX PARTE OLIVER - - - - - - **257**

2. —— *Second bar—Licensing Act* 1898 (*No.* 1111), *s.* 142—*Second bar on licensed premises, permission to use—Transfer of premises—Right of transferee to use second bar.*] The right to use a second bar upon the licensed premises of a licensed victualler does not run with the land, and a transfer of such premises does not enable the transferee to use such second bar without obtaining permission therefor from the Licensing Court. OLIVER *v.* O'CONNELL **329**

3. —— *Sunday trading—Licensing Act* 1890 (*No.* 1111), *ss.* 134, 165, 193—*Obligations of licensee—"Sale" or "barter" of or "traffic" in liquor—Admissions by accused person—Statement in presence of accused—Evasive denial by accused—Evidence—Hearsay—Admissibility —"Licensed premises" — Yard of hotel — Appeal under Licensing Act* 1890—*Amendment of charge on appeal.*] In a prosecution under sec. 134 of the *Licensing Act* 1890 evidence was given by a constable that on a certain Sunday he saw a woman coming from the back entrance of an hotel with a bottle containing beer; that he took her back to the hotel and to the licensee (the defendant), in whose presence she said "I got the beer from a man in the yard, and gave him 3*d.* for it;" and that the defendant said, "I did not serve her with any beer. Cannot you let this pass?" The woman was not available as a witness, and no evidence was called for the defence:—*Held,* that the statement of the defendant was admissible in evidence as an admission, and that consequently the statement of the woman which led up to it was also admissible:—*Held,* that the yard of an hotel should always be assumed to be part of the licensed premises, until the contrary is shown. *Cairns* v. *Peterson* ([1876] 2 V.L.R. (L.) 143) followed:—*Held,* that the defendant was rightly convicted of a "traffic in liquor on licensed premises" within the meaning of the section. The meaning of the words "sale," "barter," and "traffic" in sec. 134 of the *Licensing Act* 1890 discussed. The obligations of a licensee with regard to trading on a Sunday discussed. Upon an appeal or other application of the kind referred to in sec. 193 of the *Licensing Act* 1890 the Court or Judge has no jurisdiction to alter the charge in the information. GRAVES *v.* ROTH - - **841**

—— Licensed premises—Tenant for life—Repairs—Intention of testator - **166**
See WILL. 3.

—— Licensed premises—Yard of hotel—Trading on Sunday — "Sale," "barter," "traffic" in liquor - - **841**
See LICENSING. 3.

LIFE ASSURANCE—*Companies Act* 1900 (*No.* 1699), *s.* 3, *sub-ss.* (1) *and* (3)—*Protection of policy moneys from creditors—Married Women's Property Act* 1890 (*No.* 1116), *s.* 14—*Policy for benefit of wife—Death of wife before husband—Resulting trust—Marshalling assets.*] The effect of sec. 3, sub-sec. (3), of Act No. 1699 is to protect the policy moneys maturing at death of assured, and in which he has a property or interest, from the creditors of the assured without any limitation as to the amount, unless there is an express direction in the will of the assured to apply them to the payment of his debts. When a husband insures his life for the benefit of his wife within sec. 14 of the *Married Women's Property Act* 1890, and the wife predeceases her husband, the policy moneys result to the husband. The rule in *Allen* v. *Edmonds* ([1886] 12 V.L.R. 789) applied as to marshalling assets. MUELLER *v.* GAIR - - **263**

LIMITATION OF ACTION—Adverse possession—Crown licence followed by grant — Time running against the Crown
See REAL PROPERTY ACT 1890. [692

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LIQUIDATED DEMAND—Money had and received—Claim for deposit - 139
See COUNTY COURT.

—— Use and occupation—Special summons—Practice - - - - - - 830
See COUNTY COURT. 2.

LOCAL GOVERNMENT — *Construction of works—Local Government Act* 1890 (*No.* 1112)—*Construction of drains—Insufficient capacity of drain—Injury to private owner.*] A municipality employing an efficient, skilful engineer constructed a drain within its district under the powers conferred by the *Local Government Act* 1890. This drain was of insufficient capacity to carry off the water drainage and offensive matter that flowed into it, and, in times of heavy rain, caused damage to the plaintiff:—*Held* by the Full Court (HOLROYD, A'BECKETT, and HOOD, JJ.) that the municipality was liable for the damages thus caused:—*Per* HOLROYD, J. That there is no provision in the Act which empowered the municipality to create a public nuisance:—*Per* A'BECKETT, J. That the casting of drainage upon private property to its injury is not a necessary consequence of making a drain:—*Per* HOOD, J. That the decision of *Carslake* v. *President, etc., of the Shire of Caulfield* ([1891] 17 V.L.R. 560) governed the present case. *East Fremantle Corporation* v. *Annois* ([1902] A.C. 213) discussed. KANNULUIK *v.* MAYOR, ETC., OF HAWTHORN - - - - - - - - 308

2. —— *Contract with council—Local Government Act* 1890 (*No.* 1112), *s.* 51—*Id.* 1891 (*No.* 1243), *s.* 16—*Councillor "concerned or participating" in contracts with the municipality—Disqualification.*] The object of sec. 51 of the *Local Government Act* 1890 (as amended by Act No. 1243) is to prohibit a councillor from placing himself in a position where his duty may be in conflict with his interest. The defendant, a councillor of the X. corporation, was also the paid secretary of an agricultural society which had a permissive occupancy, for the purposes of holding shows, of certain land vested in the corporation. The council at various times expended money on the Show Grounds, and made contracts for work to be done thereon:—*Held*, that the defendant was not by reason merely thereof "concerned or participating in a contract with the municipality or in work done under the authority of the council," so as to incapacitate him from holding office as a councillor. MIDDLETON *v.* MARKS - - - - - - - - - - 631

3. —— *Rates and rating—Local Government Act* 1890 (*No.* 1112), *s.* 246—*Rateable Property—Land in the occupation of the Government of Victoria—Exemptions—Prior judgment for rates—Estoppel.*] Land leased to the Government and occupied by a member of the police force by virtue of a regulation requiring him as part of his duty to occupy and reside in quarters provided for him by the Government is land in the occupation of the Crown, and is exempt from rates under sec. 246 of Act No. 1112. The fact that an order has been made by a court of petty sessions directing the payment of rates for a particular year does not estop a person from raising the question of the rateability of the land in proceedings for the recovery of rates for a subsequent year. MAYOR, ETC., OF RICHMOND *v.* GRAY - - - - - - - 335

4. —— *Rates and Rating—The Local Government Act* 1890 (*No.* 1112), *ss.* 246, 277—*The Local Government Act* 1891 (*No.* 1243), *ss.* 56, 60—*Rateability—Premises used as primary school—Exclusive use—Notice of appeal, rates—Amendment of notice of appeal—New case raised—Justices Act* 1890 (*No.* 1105), *s.* 185.] The appellant was rated in respect of buildings which were used by day as a primary free school. The buildings were, however, used almost every night for concerts and meetings of societies connected with the church which had the conduct of the school classes. No charges were made by the appellant for such use:—*Held*, that the buildings were not "used exclusively for the purposes of any primary school" within the meaning of sec. 246 of the *Local Government Act* 1890 as amended by sec. 56 of Act No. 1243, and were rateable. There is no jurisdiction at the hearing of a rate appeal to allow a notice of appeal to be amended so as to raise a new case. KELLY *v.* THE MAYOR, ETC., OF FITZROY - - - - - - - 604

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—— Right of councillor to see documents—Refusal by mayor to produce—Public document - - - - - - 272
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MAINTENANCE OF WIFE — Order for—Resumption of cohabitation — Disobedience of order—*Marriage Act* 1890
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MAINTENANCE OF INFANT—Past maintenance — Breaking in on *corpus*—Urgency - - - - - - 270
See INFANTS.

MANDAMUS—*Public document in possession of mayor—Request by councillor to produce—Right to production—Local Government Act* 1890, *ss.* 10, 75, 76, 182, 191, *and Schedule XIII.*] The issue of the prerogative writ of *mandamus* will be restricted to cases where justice would otherwise fail, or where some real interest of the applicant is involved, and might suffer if the writ were refused. It will not be granted

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MANDAMUS—*continued.*

merely in order to decide some question of abstract right. A requisition for the use of the Town Hall was addressed to the mayor of a city. Subsequently, at a meeting of the council, the conduct of X., a councillor, in publicly making certain charges against the mayor, was under discussion. X. stated that he blamed the mayor for treating the requisition as his own private property, and called upon him to produce it. The mayor refused to do so. The subject of the requisition was not otherwise before the meeting of the council in question. X. having obtained a rule *nisi* for a *mandamus* to compel him to produce the document:—*Held*, that as there was no business before the meeting to which the requisition was in any way relevant, X. was not entitled to its production. CAROLIN *v.* CURNOW - - 272

MARKING OUT—Claim—Posts on land which cannot be taken up as a claim—Title *See* MINES ACT 1890. 2. [1011

MARRIAGE—Affinity—Marriage with daughter of sister of deceased wife - 98
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—— Consideration of—Parol promise to leave property by will—Part performance *See* INSTRUMENTS ACT 1890. [649

MARRIAGE ACT 1890—(*No.* 1166), *Part IV., ss.* 42, 43, *etc.—Order for maintenance of illegitimate child—Failure to obey—Action for arrears—Cause of action—"Rules of the Supreme Court* 1900*"—Order XIV.* (*a*), *r.* 1—*Summary judgment.*] An order was made by justices under Part IV. of the *Marriage Act* 1890, on the complaint of the plaintiff, by which X. was ordered to pay a weekly sum to the clerk of Petty Sessions for the maintenance of his illegitimate child born of the plaintiff. X. having failed to obey the order, an action was brought after his death by the plaintiff against his executors for the arrears due on the order:—*Held*, on an application by the defendant for summary judgment, that the action would not lie. HENRY *v.* HARPER 667

—— Dissolution of marriage—Discretionary bar to decree - - - - - 442
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See LIFE ASSURANCE.

MASTER AND SERVANT—*Principal and agent—Duration of service—Notice of determination—Remuneration by salary and commission—Future commission, right to.*] A company in England engaged in fulfilling orders sent from Australia to the company, agreed with A. that he should act as the company's agent in Australia, and that he should receive a salary at the rate of £150 a year, and in addition a certain commission on all orders executed by the company in Australia:—*Held*, that the engagement of A. by the company was a yearly engagement, terminable upon six months' notice, ending at the expiration of the year. The company terminated the agreement by one month's notice, but in an action for breach of agreement it paid six months' salary into Court:—*Held*, in a claim for damages for breach of the agreement, that A. was entitled to his salary in lieu of notice, and to commission for the period for which the notice should have been given, although he had, by virtue of the notice of determination of agreement actually given, ceased to act as agent for the company. BROADHURST AND COMPANY LIMITED *v.* ROBINSON - - - - - - - 447

—— Victorian railways—Servant—Holding office during pleasure—Dismissal 566
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MENACES—Letter demanding money with—Reasonable and probable cause—Opinion and belief of prisoner - 28
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MERCHANT SHIPPING ACT 1894—Application of to foreigner—Adoption of regulations, but not provisions of Statute—Effect of—Collision on high seas - - - - - - - 874
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METROPOLITAN BOARD OF WORKS—Gas mains—Rateability of—Sewered and unsewered properties - 340
See SEWERS RATES. 3.

MINE—Accident in mine—Onus of proof—*Mines Act* 1897 - - - 636
See NEGLIGENCE.

MINES ACT 1890—(*No.* 1120), *ss.* 244, 249, 267—*Inspection—Order for inspection—Jurisdiction of warden to make second order.*] A warden has jurisdiction under sec. 244 of the *Mines Act* 1890, on proper materials, to make an order for inspection as often as he may think fit. The fact that he has already made an order for inspection, and that such order has been acted upon, does not deprive him of jurisdiction to make another order or orders in favour of the same applicant for inspection of the same mine. LAST CHANCE UNITED GOLD MINING COMPANY NO LIABILITY *v.* THE BRITANNIA UNITED GOLD MINING COMPANY NO LIABILITY - - 683

2. —— (*No.* 1120), *s.* 3—*Marking out—"Claim"—Pegs placed on land which could not be lawfully taken up as a claim—Title to*

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MINES ACT 1890—*continued.*

land within the pegs which could have been lawfully taken up — By-law No. 4 of the Castlemaine Mining Board, clauses 1 *and* 3.] A by-law provided that an alluvial claim shall be marked out by placing a substantial peg of a specified size at each corner of the claim, and that the extent of the ground marked out shall be in proportion to its depth. The complainants purported to mark out under the by-law certain land. Three of the pegs were placed on land which could not lawfully be taken up as a claim. However, a large proportion of the land marked out could have been lawfully taken up as a claim:—*Held*, that the marking out gave the complainants no title under the by-law to any portion of the land included in the marking out. MITCHELL *v.* BOWEN - - - 1011

3. —— (*No.* 1120), *s.* 5—*Miner's right—Right to possession of land under miner's right where no by-laws have been made—Tailings site—Mines Act* 1897 (*No.* 1514), *s.* 53 (1)—*Forfeiture of tailings.*] By sec. 5 of the *Mines Act* 1890 (No. 1120) it is provided that "Any person who shall be the holder . . . . of any such miner's right shall subject to the provisions of this part of this Act and to the by-laws to be made as hereinafter mentioned be entitled . . . . to take possession for gold-mining purposes of a parcel or so many parcels as such by-laws shall permit of Crown land. . . ." :—*Held*, that the holder of a miner's right is not entitled to take possession of any land until appropriate by-laws have been made. It was provided by a by-law that any miner should be at liberty to hold possession of any quartz, earth, timber, or other substance that may have been stacked by him or of which he is the owner, and might register such substance with the mining registrar:—*Held*, that such by-law did not upon registration of the substance referred to confer a holding title to the site upon which the materials were stacked. Sec. 53 (1) of the *Mines Act* 1897 provides for the forfeiture of tailings left upon land comprised in a lease even though such tailings were not placed there during the currency of the lease. BESTMAN *v.* MITTEN - - - - - - - 851

4. —— *Residence area — Mines Act* 1890 (*No.* 1120), *ss.* 28, 29, 33 — *Mines Act* 1897 (*No.* 1514), *s.* 15 — *Residence area, registration of — Transfer — Complaint for cancellation of registration of residence area—Jurisdiction of warden.*] Where the assignee of an existing residence area is registered as the holder of it, there is no break in the title, but where a piece of Crown land, which has lost its residential qualification, is again occupied as a residence area, there is a break in the title. A complainant applying under sec. 33 of No. 1120 for the cancellation of a residence area may, at the same time, apply to have himself registered as holder of such residence area, and the warden, under sec. 15 of Act No. 1514, may direct that he be so registered, and such direction may be given either in the order for cancellation or by any subsequent order. To render such last-mentioned direction effectual, the ground must be taken up afresh as a residence area, and any direction by the warden should be made conditional upon the complainant perfecting his title within a reasonable time, which the warden may fix:—*Semble*, the lawful holder of two residence areas may apply to the warden to cancel the registration of a third area, although he may not lawfully get registered for it as a new residence area after cancellation. MASCIORINI *v.* DOWLING - - - - - - 368

MINISTER OF THE CROWN—Salary of Minister—Salary of member of Federal Parliament—Divisibility of salary—Earned in Victoria - - - 748
See INCOME TAX.

MISJOINDER—Misjoinder of causes of action—Several defendants - - 987
See PRACTICE. 5.

MODE OF TRIAL—Jury—"Causes or matters within the cognizance of the Court in its equitable jurisdiction"—Fraud—Declaration in Equity - - 238
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NEGLECTED CHILDREN'S ACT 1890—(*No.* 1121), *ss.* 25, 29, 30—*Regulations* 102, 108—*Power to demand back child boarded out—Religion of parent—Habeas corpus.*] A., a ward of the Department for Neglected Children, had been placed with X. under sec. 30 (5) of the *Neglected Children's Act* 1890 and the regulations thereunder. On the recommendation of the secretary, indorsed by the minister, A. was handed over to Y. :—*Held*, that the secretary could not of his own motion afterwards demand that the child be handed back to the custody of the department :—*Per* MADDEN, C.J. The secretary under sec. 30 (5) has a right to place a ward with any suitable person willing to take it. Once he has so placed it he cannot demand it back unless the Governor in Council or the Minister orders it. IN RE KAY, EX PARTE DAVIS - - - - - - - - - 685

NEGLIGENCE—*Mines Act* 1897 (*No.* 1514), *s.* 129—*Accident in a mine—Negligence—Onus of proof—Questions for jury.*] In an action for damages for injuries caused by an accident in a mine the jury found—(*a*) that there was an accident in the defendant's mine on the date in question; (*b*) that that accident caused the plaintiff's injuries; (*c*) that the defendant had not satisfied them that the accident was not caused by any negligence on its part :—*Held* that, having regard to sec. 129 of the *Mines Act* 1897, the plaintiff was, on these findings, entitled to judgment, and that an express finding of negligence was unnecessary. BROCKWELL *v.* THE LONG TUNNEL EXTENDED GOLD MINING COMPANY - - - - - - - - 636

2. —— *Charge for admission to a building—Undertaking of owner of building—Injury to person using—Degree of care—Misdirection.*] In an action for damages for injuries sustained by the plaintiff by reason of a defect in the flooring round defendant's swimming baths, for admission to which he had been charged by the defendant, the jury were directed "that the defendant was bound to take reasonable care to prevent accidents to persons using the baths; that reasonable care was the care which a reasonable man ought, under the circumstances to exercise; that if

NEGLIGENCE—*continued.*

the defendant had exercised such reasonable care there was no negligence, and the defendant would be entitled to succeed" :—*Held* : (*a*) That this direction was sufficient. (*b*) That it was not necessary to tell the jury that the defendant had impliedly contracted and warranted that the structure was reasonably fit for the purpose for which it was to be used. *Francis* v. *Cockrell* ([1870] L.R. 5 Q.B. 501) discussed. FAUX *v.* WILLIAMSTOWN BATHING CO. LIMITED - - - - - - - - 459

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PENALTIES—Action for—Councillor "concerned or participating" in contracts —Disqualification - - - 631
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PLEADING—*Practice—Pleading in an action for libel—Justification—Justifying substance of the libel—Variation between libel and matter pleaded in justification — Particulars — Fair comment.*] In an action for libel the article complained of alleged that the plaintiff, while holding the position of *organizing secretary* of a branch of a miners' association applied for the position of clerk to a mine, thus showing himself ready to desert the working miner. The defendant, under a defence of justification, pleaded that the plaintiff while holding the position of *president* of the said branch applied for the clerkship, the duties of which were inconsistent with and opposed to the objects of the association. On an application to strike out the plea as irrelevant:—*Held*, that the plea was good, on the ground that the defendant was entitled to rely on the facts therein alleged in proof of the substantial truth of the charge contained in the alleged libel. The defendant also pleaded that the said association was a

PLEADING—*continued.*

public association, and that the words complained of, so far as they consisted of expressions of opinion, were fair comment upon its acts and management, which were matters of public interest, and on the acts and conduct of the plaintiff as an officer of such branch. HODGES, J., refused to strike out the plea, but ordered defendant to give particulars of the facts upon which it was alleged that the association was a public association. Defendant, in justifying another part of the article, pleaded "that the majority of a party" of which plaintiff was a member had complained to the manager of plaintiff's incapacity, and had refused to work with him:—*Held*, that the defendant should not be ordered to give particulars of the names of the "majority of the party," as he would not be bound to prove their names at the trial. MEAD *v.* ANDERSON 72

POLICE OFFENCES ACT 1890—(*No.* 1126), *s.* 41 (12)—*Place of public resort.*] A pathway leading up to and forming part of railway station premises adjoining the ticket office, along which numbers of people passed, and on the fence of which stock notices were posted for the information of the public, is "a place of public resort" within the meaning of sec. 41, sub-sec. (xii.), of the *Police Offences Act* 1890. TURNER *v.* MANGAN - - - - - - - 739

—— Conviction wrongly drawn up—Grounds for setting aside—Amendment—Order to review - - - - - - 152
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POLICE REGULATION ACT 1890 — (*No.* 1127), *s.* 58—*Information and warrant for stealing goods—Authority of constable to seize goods—Information not heard—Disputed property in possession of police—Application to justices to determine possession — Horse — "Goods"—Authority of constable to arrest a suspected person.*] The application to justices by a constable under sec. 58 of the *Police Regulation Act* 1890 may be made in all cases where the constable, as such, has lawfully taken possession of goods (except where the goods have been distrained under the warrant of a justice), and it is doubtful who is entitled to the possession of them. A constable may lawfully take possession of goods alleged to have been stolen where he does so without force or violence. A horse is "goods" within the meaning of sec. 58 of the *Police Regulation Act* 1890. A constable is justified in arresting a person whom he has reasonable grounds to suspect has committed a felony, although in fact no felony has been committed. DALTON *v.* MCNAUGHTON AND PITCHER - - 144

POLICY MONEYS—Protection of—Creditors — *Companies Act* 1900 — Policy for benefit of wife — Resulting trust for husband - - - - - - 263
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POST AND TELEGRAPH ACT 1901—(*No.* 12), *ss.* 28 *and* 29—"*Newspaper*"—*Bradshaw's Guide.*] The question as to whether a publication is a newspaper within the meaning of sec. 28 of the *Post and Telegraph Act* 1901 is almost entirely one of fact, to be decided upon an inspection of the document, guided by common knowledge. A publication which in its real nature is essentially a book of reference is not a newspaper within the meaning of sec. 28. IN RE BRADSHAW'S GUIDE; EX PARTE STILLWELL - - - - - - - - - - 415

POSTPONEMENT OF SALE — Direction to sell—Duty of trustee—Discretion of trustee — Originating summons — Infants—Representation—Practice 793
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PRACTICE—*Affidavit*—"*On the return of the order to review*"—*Adjournment of order to review*—*Affidavit filed after return day fixed by order nisi to review*—*Justices Act* 1890 (*No.* 1105), *s.* 146.] Where the hearing of an order to review has been adjourned, an affidavit filed after the return day fixed by the order *nisi* may be read upon the adjourned hearing. MONTAGUE *v.* LAWSON - - - - - 833

2. —— *Banker's books — Production of banker's books at trial—Undertaking by bank to produce verified copies—Circumstances under which verified copies of banker's books are admissible in evidence—Evidence Act* 1890 (*No.* 1088), *ss.* 35, 36, 39.] The Court has power under sec. 39 of the *Evidence Act* 1890 to order the production of a banker's books at the trial of an action, although the bank is not a party to the action. *Hay* v. *Paterson, In re The Colonial Bank* ([1889] 15 V.L.R. 360). The Court will grant an order for such production, notwithstanding an undertaking by the bank to have verified copies of all the material entries in such books in Court at the trial to be used in evidence if the Court should so direct, because such verified copies could not in the circumstances, by virtue of sec. 36 of the Act, be adduced in evidence at the trial. DARLING *v.* CARTER & CO. - - - - 136

3. —— *Discovery—Application for discovery before delivery of statement of claim—Affidavit in support, necessity for*—"*Rules of the Supreme Court* 1884"—*Order XXXI.*—"*Rules of the Supreme Court* 1900"—*Order XXX.*] No affidavit is necessary upon which to base an application for discovery and inspection of documents before delivery of a statement of claim, but the Judge in granting such application may act upon the facts as stated by counsel from their instructions. SMITH *v.* NEW DEMPSEY'S GOLD MINING COMPANY NO LIABILITY - - - - - - - - 100

4. —— *Execution—Writ of fi. fa., form of—Joint creditors under order of Court—Joint debtors under order of Court—Order for issue of writ of fi. fa. by one joint creditor against one joint debtor—Irregularity—Application to set aside.*] A writ of *fieri facias* should accord in all respects with the judgment or order it seeks to enforce:—*Held*, therefore, that where an order for the payment of costs had been made in favour of two defendants jointly against two plaintiffs jointly, an order obtained by one of such defendants for the issue of a writ of *fieri facias* against one of such plaintiffs was irregular, and should be set aside. CROWLEY *v.* UNION BANK - - - - - - 385

5. —— *Joinder of causes of action*—"*Rules of the Supreme Court* 1884"—*Order XVI., r.* 5; *Order XVIII., r.* 1—*Practice—Misjoinder of causes of action—Several defendants.*] In equity wherever there is a general common whole cause of suit for the plaintiff he is entitled to bring his suit for the relief attaching to the whole cause of suit. If in such suit other defendants are joined as interested in some only of the matters in such suit it is not a misjoinder to include such defendants as parties to the suit. *Britter* v. *Sprigg* ([1900] 26 V.L.R. 65) does not decide that misjoinder of causes of action is universally a ground for general judgment for defendants. WEBSTER *v.* SHAW - 987

6. —— *Judgment, setting aside — Consent order—Order not passed and entered—Consent in ignorance of particular fact—Withdrawal of consent—Misapprehension as to terms—Fraud—Jurisdiction of Court to vary consent order.*] Proceedings to set aside a judgment must be taken before the judgment is passed and entered. A consent order, agreed to by the parties in Court after discussion of the case with the concurrence of their legal advisers, and with the assent of the Court, cannot afterwards be varied on the mere allegation that the consent was given in ignorance of a particular fact, though it may be clear that, with the knowledge of such fact, neither the consent of one of the parties nor the assent of the Court would have been given. A withdrawal from such a consent by one of the parties is only permissible where he was under a misapprehension as to the terms of the bargain, or there has been fraud by the other party. Where the parties, without any misapprehension on their part, and without any fraud either on the Court or as between the parties, have agreed to a consent order being made, the Court, provided such order contains no illegality, is bound to record it, and cannot afterwards vary it. Decision of A'Beckett, J., overruled. REX *v.* MUNICIPAL COUNCIL OF THE SHIRE OF MARONG, EX PARTE FILOCK - 355

7. —— *Liquidated demand*—"*Rules of the Supreme Court* 1884"—*Order III., r.* 6—*Specially indorsed writ—Debt or liquidated demand arising under a contract — Deposit money on contract to purchase land.*] The plaintiff indorsed a writ under Order III., r. 6, with a claim to recover the sum of 1000*l.*, which the defendant in a contract for the

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PRACTICE—*continued.*

purchase of land agreed to pay as a deposit "upon the acceptance of this offer." The offer was accepted :—*Held*, that this was not a debt or liquidated demand arising under a contract within the meaning of Order III., r. 6, and was not the subject-matter for a specially indorsed writ. BEAR *v.* GARLINGE - - 601

8. —— *Mining suit — Parties to action — Association improperly incorporated—Trustee.*] Cotton, who held certain water rights as trustee for a no-liability company, transferred such rights to one May, as trustee for the same company. May never became registered in respect of such water rights. Cotton subsequently transferred the same rights to Jacques, who obtained registration in respect of the same. In an action brought by the company and May as trustee for the company against Cotton and Jacques it was proved that the company, not having 5 per cent. of its subscribed capital paid up, was not legally incorporated, and the Judge of the Court of Mines holding that the action not being maintainable by the company it could not be carried on by May alone as trustee, gave judgment for the defendants :—*Held*, upon appeal by the Full Court (HOLROYD and HODGES, JJ., A'BECKETT, J., dissenting), that the action could be carried on by the plaintiff May alone as trustee for those beneficially interested, although they were not parties to the action. THE SISTERS GOLD MINING CO. NO LIABILITY *v.* COTTON - 591

9. —— *Mode of trial — Jury—"Causes or matters within the cognizance of the Court in its equitable jurisdiction"—Concurrent jurisdiction of equity — Fraud — Fraudulent preference within the meaning of the Insolvency Acts — Declaration in equity — "Rules of the Supreme Court* 1884"—*Order XXXVI., rr.* 3, 6, 7 (*a*).] A Court of equity has concurrent jurisdiction with a Court of law in all cases involving fraud. The meaning of Order XXXVI., r. 6, of the "Rules of the Supreme Court 1884" is that causes or matters in which a Court of equity had concurrent jurisdiction with a Court of law (as well as those in which it had exclusive jurisdiction) shall be tried without a jury, unless the Court or a Judge thinks fit to otherwise order. By the indorsement on a writ of summons, a plaintiff claimed, "as trustee of the insolvent estate of D., a sum of 1765*l.* for money received by the defendant to the use of the insolvent and his estate," and also claimed "a declaration that the payment of the said sum by D. to the defendant was a fraudulent preference within the meaning of the *Insolvency Acts*, and void as against the plaintiff":—*Held* that, by reason of the declaration being claimed, the matter was one "heretofore within the cognizance of the Court in its equitable jurisdiction," within the meaning of Order XXXVI., r. 3. BARKER *v.* HENTY - - - - - - - 293

PRACTICE—*continued.*

10. —— *Originating summons—Question of fact—Jurisdiction—"Rules of the Supreme Court* 1884"—*Order LV.*] The Court has no jurisdiction to determine a question of fact upon an originating summons. *In re* GREW; CANAWAY *v.* CANAWAY - - - - - 324

11. —— *Originating summons—Questions of fact — Jurisdiction — "Rules of the Supreme Court* 1884" — *Order LV.*] The Court has jurisdiction to determine questions of fact upon an originating summons. Judgment of HOOD, J. (29 V.L.R. 324), reversed. *In re* GREW; CANAWAY *v.* CANAWAY - - - - - 622

12. —— *Rate appeals—Case stated by County Court Judge for the determination of Supreme Court—Form of case—Jurisdiction to ask questions—Local Government Act* 1903 (*No.* 1893, *s.* 302 (4). Sec. 302 (4) of the *Local Government Act* 1903 does not authorize a County Court Judge, in stating a case for the determination of the Supreme Court, to ask any questions, but he has merely to state the facts of the case as found by him. ELECTRIC SUPPLY COMPANY OF VICTORIA *v.* THE COUNCIL OF THE CITY OF BENDIGO - - 1009

—— Action by person out of the jurisdiction—Summons for final judgment pending *See* SECURITY FOR COSTS. [328

—— Admission of barrister and solicitor—"Trade or business"—School teacher *See* LEGAL PROFESSION. [1

—— Caveator not appearing on day of return of order *nisi* - - - - 945 *See* PROBATE PRACTICE. 4.

—— Complainant before justices withdrawing case—Costs—Condition precedent—*Justices Act* 1890, s. 85 - - 938 *See* JUSTICES. 3.

—— Costs—Crown—*Crown Remedies and Liability Act* 1890—Jurisdiction - 859 *See* CROWN.

—— Costs—Instructions for brief—Two counsel—Motion—Costs on - - 114 *See* COSTS. 6.

—— Costs—Party and party costs—Costs incurred before issue of writ—Taxing officer's discretion—Order LXV., r. 27 (9) - - - - - - - 427 *See* COSTS.

—— Costs—Preparing statement for duty—Gross or net value—"Property left" *See* PROBATE CHARGES ACT 1903. [791

—— Costs—Taxation of—Receiver—Costs of fixing amount of remuneration—Costs "properly incurred" - - 719 *See* COSTS. 2.

—— County Court—Use and occupation—Claim for—Special summons - 830 *See* COUNTY COURT. 2.

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— Defamation — Justification — Justifying substance of libel—Variation between libel and matter pleaded in justification - - - - - - - 722
See PLEADING.

— Dismissing action—Abuse of process of Court—Summary judgment for defendant - - - - - - - 649
See INSTRUMENTS ACT 1890.

— General Sessions — Appeal from — Prematernity order—*Marriage Act* 1900 Term for appeal—Delay - - 562
See APPEAL TO GENERAL SESSIONS.

— Justices—Uncontradicted evidence—Duty of justices - - - - - - 652
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— Licensing Court—Special case—Certificate to club—Refusal of - - 257
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— Parties to action—Association improperly incorporated—Trustee - - 591
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— Petty Sessions — Courts of — Audience, right of—Prosecution—Conduct of 558
See JUSTICES. 2.

— Probate—Application to compel executor to bring will into Court—Affidavit in support - - - - - - 862
See PROBATE PRACTICE. 2.

— Probate practice—Sealing probate in Victoria—Attorney under power—Probate granted to in other State - - 170
See PROBATE PRACTICE. 5.

— Public document in possession of mayor—Production of—Request by councillor for production - - - - - 272
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— Right to oppose—Registration of trade mark — P. & O. — Initial letters of words—Words calculated to deceive
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— *Supreme Court Act* 1890, s. 232—Security —Lodgment of—Time - - 940
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PRECATORY TRUST—Absolute gift—Gift to widow for benefit of herself and children - - - - - - - - 932
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PREROGATIVE WRIT OF MANDAMUS—Practice as to—Discretion of Court—Vexatious—Refusal of writ - 272
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PRINCIPAL AND AGENT—*Instruments Act* 1890 (*No.* 1103), *ss.* 208, 209—*Contract for sale of land—Authority of agent—Parol evidence—Conditions of sale.*] Where a principal gives authority in writing to an agent in general terms to sell certain land at a fixed price he will not be bound by any contract of sale signed by the agent unless it be a reasonable and proper contract having regard to the nature of the property, the circumstances of the case, the practice of the market, and the views of the principal where they are known to the agent. A. bought certain land from B., the agent of the vendor, and immediately afterwards signed an authority to B. to sell part of the land at 7*l.* per acre. B. on the same day signed a contract for the sale of this part to C. One of the conditions of this contract embodied Table A of the *Transfer of Land Act* 1890, and fixed the time for completion at one month. All parties had notice that A. had only bought that day under similar conditions :—*Held,* that this was not under the circumstances a reasonable contract, and therefore not one which the agent was authorized to make. MOORE *v.* NELSON - - - 387

— Duration of service—Wrongful dismissal —Notice—Commission—Remuneration
See MASTER AND SERVANT. [447

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PROBATE CHARGES ACT 1903—(*No.* 1827), *s.* 2—*Solicitor's charges for obtaining probate—"Property left"—Gross or net value—Costs of preparing statement — What are included in.*] For the purpose of determining the charges to be allowed under the *Probate Charges Act* 1903 to a solicitor for obtaining probate the gross value of the estate is to be looked at. The costs of "preparing statement," which may be charged for separately, include the costs of instructions for statement and of the affidavit verifying the statement. IN RE PYNE; EX PARTE THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED 791

PROBATE PRACTICE—*Administration bond —Dispensing with bond — Administration and Probate Act* 1899 (*No.* 1060), *s.* 15.] The Court has no jurisdiction to dispense with an administration bond. *In the Goods of Powis* ([1864] 34 L.J. (P.) 55) followed. IN THE WILL OF CHEVALIER - - - - - - 326

2. — *Administration and Probate Acts* 1890 (*No.* 1060), *s.* 14; 1892 (*No.* 1261), *s.* 14

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PROBATE PRACTICE—*continued.*

—*Application to compel executor to bring will into Court—Jurisdiction to grant summons—"Probate Rules of* 1854," *applicability of—Affidavit in support, necessity for—Probate and administration fees—Insufficiently stamped summons.*] The practice upon an application for a summons under sec. 14 of the *Administration and Probate Act* 1892 (No. 1261) is regulated by the "Probate Rules of 1854," and therefore there is no jurisdiction to grant such application without an affidavit of facts as prescribed by rule 4 of such rules. The fees prescribed by rule 23 of the "Probate and Administration Rules 1900" and the Second Schedule thereto must in all cases be demanded and paid:—*Held*, therefore, that a summons under sec. 14 of the *Administration and Probate Act* 1892, to which was affixed a stamp of less value than the fee prescribed by such schedule, was not properly issued. IN RE THE ESTATE OF KERR - - - - - - 862

3. —— *Administration and Probate Act* 1890, *ss.* 39, 40—*Exemplification of probate—Probate granted in New South Wales to three executors — Application for re-sealing by one only.*] Where probate has been granted in another State to three executors, all of whom still hold the office of executor, they must all join in an application for sealing exemplification of the probate in Victoria under sec. 40 of the *Administration and Probate Act* 1890. *In the Will of Vivian* ([1901] 23 A.L.T. 37) distinguished. The Court in such a case granted probate of an exemplified copy of the will to one executor, reserving leave to the others to come in. IN THE WILL OF ROFE - - 681

4. —— *Caveat—Administration and Probate Act* 1890 (*No.* 1060), *s.* 21—*Will—Proceedings where caveator does not appear.*] Where the caveator has appeared upon the return day of the order *nisi* but does not appear at the hearing of the case upon the day on which it has been listed for hearing, the Court may make the order absolute without calling upon the executor to prove the will in due form. IN THE WILL OF HUNT - - - - - 945

5. —— *Practice—Sealing probate in Victoria—Administration and Probate Act* 1890 (*No.* 1060), *s.* 40 — "*Executor and administrator therein named,*" *meaning of.*] The words "executor or administrator therein named," in sec. 40 of Act No. 1660, include the person named in the probate, although he is not named in the will. An attorney under power of an executor, where such attorney has obtained probate in another State, is an "executor named therein" within the meaning of sec. 40. IN RE PHILLIPS - - - - - - 170

6. —— *Testator domiciled in Victoria—Will relating solely to property in foreign country—Admissibility to probate in Victoria.*] A will disposing of property in a foreign country only is not entitled to probate in Victoria, though the testator be domiciled in Victoria. *In the Goods of Coode* ([1867] L.R. 1 P. & D. 449) and *In the Goods of Tamplin* ([1894] P.D. 39) followed. *In the Goods of Harris* ([1870] L.R. 2 P. & D. 83), *In the Goods of Hayden* ([1874] 43 L.J.P. & M. 26), *In the Goods of Winter* ([1861] 30 L.J.P. & M. 56), and *Spratt v. Harris* ([1833] 4 Hag. 405) distinguished. IN THE WILL OF PALMER - - - 98

7. —— *Will—Separate wills of Australian and English property.*] Where a testator has made separate wills as to his English and his Australian property it is not necessary in an application for probate of the Australian will to incorporate the English will, and probate may be granted of the Australian will only, but the probate should bear on its face a note referring to the fact that an affidavit is on the file of the Court giving date and particulars of the English probate and certifying an attached copy of the English will. IN THE WILL OF RYDER - - - - - - - - 143

—— Charges under *Probate Charges Act* 1903 — Costs of preparing statement — Solicitor's charges - - - 791
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PROBATE RULES OF 1854—Application to compel executors to bring will into Court—*Administration Act* of 1892—Practice - - - - - - 862
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PUBLIC RESORT—Place of—Ramp at railway station - - - - - 789
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QUESTION OF FACT — Determination of — Originating summons - - 628
See PRACTICE. 11.

RABBITS—Destruction of—Liability of municipality to destroy vermin on roads
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RAILWAY STATION—Ramp leading to platform—Place of public resort—Intent to commit a felony - - - 789
See POLICE OFFENCES ACT.

RAILWAYS ACT 1890—(*No.* 1135), *s.* 70—*Holding office during pleasure—Dismissal—Exercise of pleasure.*] Railway officers and *employés* appointed under the provisions of sec. 70 of the *Railways Act* 1890 hold office during the pleasure of the Commissioners and may be removed by the Commissioners at their pleasure. The plaintiff, who, as an officer or *employé* appointed under the provisions of sec.

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RAILWAYS ACT 1890—*continued.*

70 of the *Railways Act* 1890, received a notification from the defendants, the Railways Commissioners, that unless he obeyed an order already given requiring him to sever his connection with a certain association by a specified date, he would be removed and his services dispensed with; the plaintiff refusing to sever his connection with the association then received a notice that as he had refused to carry out the instructions given his services were no longer required. In an action for wrongful dismissal:—*Held*, that the plaintiff had been removed at the pleasure of the defendants. WILLIAMES *v.* VICTORIAN RAILWAYS COMMISSIONERS - - - - - 566

RATES AND RATING — *Practice — Rate appeal — Undertaking rated to different municipalities—Choice of method of appeal—Local Government Act* 1903 (*No.* 1893), *ss.* 301, 302 (1), 306.] An undertaking rated to different municipalities is not obliged to appeal under sec. 306 of the *Local Government Act* 1903, but in a proper case has the right of appeal either under that section or under sec. 302 of the Act - - - - - 1004

—— Gas mains—Sewed and unsewered properties - - - - 340
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—— Land in the occupation of the Government of Victoria—Constable of police—Occupation of quarters as part of duty—Exemption - - - 335
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—— Primary school—Exclusive user—Beneficial occupation - - - - - 604
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—— Special case — Questions — Statement of facts—Form of case - - - 1009
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—— Sewerage rates—Valuation—Municipal—Abandonment of valuation—"Valuation in force" - - - - - 62
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—— Sewerage rates—"Valuation in force"—Municipal valuation—Appeal against valuation—Abandonment of valuation
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—— Water supply—"Refusal to supply water"—Liability for payment of rates 835
See WATER ACTS.

REAL PROPERTY ACT 1890—(*No.* 1136), *ss.* 17, 18, 19, 23—*Transfer of Land Act* 1890 (*No.* 1144), *ss.* 119, 124, *etc.*—*Land Act* 1869 (*No.* 360), *Part II.*—*Action for recovery of land—Adverse possession—Crown licence followed by Crown grant—Time running against Crown—Limitation of action—Mortgagor and mortgagee—Transfer of first mortgage—Transfer not shown on certificate of title—Right of transferee to bring ejectment—Tenancy at will.*] A. was, prior to 1878 and up to 1885, the Crown licensee of land under the *Land Act* 1869. In 1878 the defendant entered into adverse possession of the land, and had remained in possession ever since. In 1885 a Crown grant of the fee issued to A., "in pursuance of the *Land Act* 1869." A. transferred to B., to whom a certificate of title under the *Transfer of Land Statute* issued. B. gave a first mortgage of the land to C. C. transferred this mortgage to the plaintiff. The instrument of transfer was registered under the *Transfer of Land Act* 1890, but this transfer was not shown in any way on the certificate of title. B. also gave a second mortgage over the same land to the plaintiff. In an action for the recovery of the land:—*Quære* (*per* MADDEN, C.J.), whether the plaintiff could sue in ejectment unless either a transfer to him of the first mortgage or a discharge of such mortgage be shown on the certificate of title:—*Held* (by MADDEN, C.J., and by the Full Court on appeal), that the right to bring an action for the recovery of the land first accrued to plaintiff's predecessors in title in 1878, and therefore became barred in 1893. BREE *v.* SCOTT - - - - - 692

REASONABLE AND PROBABLE CAUSE—Demand of money with menaces 28
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RECEIVER—Costs of—Costs "properly incurred" - - - - - - 719
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REGISTER OF LAND TAX—Effect of—Sale of portion of "landed estate"—Reclassification—Revaluation—Notice to Registrar - - - - - 949
See LAND TAX. 2.

REGISTER OF TRADE MARKS—Rectification of—Who may apply to have register rectified - - - 965
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REGISTRATION OF RULES—Amendments registered—Effect of on, informally made—Registrar of Friendly Societies
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REGISTRATION OF TRADE MARK—Right to oppose—Words calculated to deceive—Initial letters of words—P. & O.
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REGULATIONS FOR PREVENTING COLLISIONS AT SEA—Adoption of by foreign country—Effect of—Collision on high seas—*Merchant Shipping Act* 1894, sec. 419, sub-sec. (4). - 874
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REVENUE—Duties in estates of deceased persons—Properties transferred by gift *inter vivos*—Probate duty—Whether payable by transferred properties or by estate - - - - - - 814 *See* ADMINISTRATION AND PROBATE ACT 1890. 3.

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—— r. 27 (9) - - - - - 427 *See* COSTS.

RULES OF THE SUPREME COURT 1900—Order XXX. (Summons for Directions) - - - - - - 100 *See* PRACTICE. 3.

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RULES OF THE SUPREME COURT, 26th NOVEMBER 1892—Rules 5, 14 (Admission of Barristers and Solicitors) 1 *See* LEGAL PROFESSION.

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—— Contract for — Deposit — Acceptance of offer — Final judgment — Specially indorsed writ—Liquidated demand 601 *See* PRACTICE. 7.

—— Contract for—Payment by instalments—Time the essence of the contract—Condition precedent - - - 541 *See* VENDOR AND PURCHASER. 2.

—— Contract for—Production of certificate of title in vendor's name—*Transfer of Land Act* 1890 - - - - 374 *See* VENDOR AND PURCHASER.

—— Trustee—Direction to sell—Discretion of trustee—Power to postpone sale 793 *See* WILL.

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SECURITY FOR COSTS—*Action by person out of jurisdiction—Summons for final judgment pending.*] Where an action has been commenced by a person residing out of the jurisdiction, the defendant is entitled to an order for security for costs, notwithstanding the fact that a summons for final judgment has been taken out and is pending. CHEYNE BROTHERS *v.* SCOTT - - - - - **328**

—— Appeal—Mortgage—Registration—Lodgment of security—Time - - **940**
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SEPARATE WILLS—Wills of English and Australian property—Probate to will of Australian property - - **148**
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SERVICE AND EXECUTION OF PROCESS ACT 1901—*No.* 11 (*Commonwealth*), *ss.* 4, 6, 21—*Ineffective service of copy writ—Judgment—Irregularity or nullity—Further proceedings for same debt.*] The plaintiff, who was a resident in the State of Victoria, issued a writ of summons against the defendant, a resident of the State of New South Wales, under the provisions of the *Service and Execution of Process Act* 1901. The copy of such writ was not properly indorsed when served upon the defendant. The plaintiff obtained an order against the defendant, who did not appear, at the Court of Petty Sessions at Melbourne, where the case came on. This order was registered in New South Wales under sec. 21, and the defendant then obtained an order in New South Wales staying proceedings on such registered certificate. Some months afterwards the plaintiff issued another summons for the same debt, which summons was properly served, and the defendant appeared. An order was made against the defendant under this summons, and upon an order to review such order, on the ground that it was bad, inasmuch as the first judgment or order was still in existence:—*Held*, that the service of the copy of summons in the first proceedings rendered the service ineffective, but this constituted an irregularity only, and did not render the proceedings a nullity, and the judgment thereon was good until set aside; therefore the second order, made while the first order for the same debt was in existence, should be set aside. *Fry* v. *Moore* ([1889] 23 Q.B.D. 395) applied. *Hewitson* v. *Fabre* ([1888] 21 Q.B.D. 6) distinguished. ATLAS COMPANY OF ENGINEERS *v.* YORK - - - - - - - - - **92**

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2. —— (*Commonwealth*) (*No.* 11), *ss.* 3, 4, 11, *etc.*—*Marriage Act* 1890 (*No.* 1166), *s.* 42—*Desertion of illegitimate child—Maintenance—Writ of summons issued out of a Court—Judicial and ministerial acts—Service in another State—Jurisdiction.*] A summons issued by a justice of the peace under sec. 42 of the *Marriage Act* 1890 is a writ of summons within the meaning of sec. 3 of the Commonwealth *Service and Execution of Process Act* 1901 (No. 11); but it is not a "writ of summons issued out of a Court," and cannot therefore be served in another State under sec. 4 of that Act. BUCKINGHAM *v.* WEATHERUP - - **381**

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SEWERS RATES — *Melbourne and Metropolitan Board of Works Act* 1897 (*No.* 1491), *ss.* 8, 11, 12—*Municipal valuation a condition precedent to rate—Local Government Act* 1890 (*No.* 1112), *s.* 274—*Amendment of municipal valuation—Notice of appeal against municipal valuation—Effect of abandonment of claim to rate after.*] The provisions of sec. 8 (5) of the *Melbourne and Metropolitan Board of Works Act* 1897, that for the purpose of making any rate the Board shall adopt as the net annual value of the properties the municipal valuation in force at the time of making the rate, makes the existence of such a municipal valuation of any property sought to be rated a condition precedent to the rating of such property by the Board. Where a municipal council, claiming to rate certain property, makes a valuation of

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SEWERS RATES—*continued.*

such property, and, after the owner has duly given notice of appeal against such valuation, abandons the claim to rate the property, such abandonment has the same effect as an adjudication by the Court to which the appeal is made reducing the valuation of the property to *nil. Attorney-General* v. *Shire of Hampden* ([1876] 2 V.L.R. (E.) 138) distinguished:—*Quære*, whether the Melbourne and Metropolitan Board of Works can, under the Act No. 1491, recover rates as for "sewered property" unless the property in respect of which the rates are levied "abuts" on a sewered street. MELBOURNE AND METROPOLITAN BOARD OF WORKS *v.* SPENCER - - - - - - 62

2. —— *Melbourne and Metropolitan Board of Works Act* 1890 (*No.* 1197), *Part IV.—Id.* 1897 (*No.* 1491), *ss.* 8, 9, 11, 12—"*Valuation in force*"—*Municipal valuation a condition precedent to rate—Local Government Act* 1890 (*No.* 1112), *s.* 274—*Melbourne Corporation Act* (6 *Vict.*, *No.* 7), *ss.* 67, *etc.*—27 *Vict.* (*No.* 178), *ss.* 41-44—*Amendment of municipal valuation—Notice of appeal against valuation—Effect of abandonment of claim to rate.*] The provision of sec. 8 (5) of the *Melbourne and Metropolitan Board of Works Act* 1897, that for the purpose of making any rate the Board shall adopt as the net annual value of the properties the municipal valuation in force at the time of making the rate, makes the existence of a valuation binding upon the ratepayer of any property sought to be rated a condition precedent to the rating of such property by the Board. Where a municipal council claiming to rate certain property makes a valuation of such property, and, after the owner has duly given notice of appeal against such valuation, abandons the claim to rate the property, such abandonment has the effect of an adjudication by the Court to which the appeal is made reducing the valuation of the property to *nil*:—*So held* by the Full Court (A'BECKETT and HOOD, JJ., HOLROYD, J., *dubitante*), affirming the decision of HODGES, J. (*supra*, p. 62):—*Per* HOOD, J. Where notice of appeal against a municipal valuation has been given the valuation is not a "valuation in force" until the appeal has been decided, or where no notice of appeal has been given until the time for appealing has expired. MELBOURNE AND METROPOLITAN BOARD OF WORKS *v.* SPENCER 289

3. —— *Melbourne and Metropolitan Board of Works Acts* 1890 (*No.* 1197), *ss.* 122, 131; 1897 (*No.* 1491), *ss.* 3, 5, 8, 10—*Rates—Property rateable by the Board—Sewered and unsewered property—Gas mains connected with sewered property.*] The defendant, a gas company, owned and occupied or used certain land, buildings, and works situated in various municipalities within the metropolis as defined by the *Melbourne and Metropolitan Board of Works Act* 1890. Some of such lands, buildings, and

SEWERS RATES—*continued.*

works were actually sewered; others were, in fact, unsewered, but situated within sewerage areas, whilst others were outside of sewerage areas. Connected with, and used as part of the undertaking, was a reticulation of gas mains spreading over various municipalities, and so constructed that every part of the whole undertaking was connected with every other part:—*Held* by the Full Court (reversing Williams, J.) that such gas mains were not rateable by the Board under sec. 8 of the Act No. 1491. The only property which is rateable by the Board under the Act 1197, as modified by the Act No. 1491, is property which is either sewered or capable of being sewered. MELBOURNE AND METROPOLITAN BOARD OF WORKS *v.* METROPOLITAN GAS COMPANY - - 340

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SHEEP OR CATTLE DRIVEN ACROSS LAND—Notice—Interest in land—Grazing licensee - - - 641
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SHIP AND SHIPPING—*Collision—Merchant Shipping Act* 1894 (57 *&* 58 *Vict.*, *c.* 60), *ss.* 418, 419, 422, 424, 734—*Foreign ship—Application of Act to foreign ship on the high seas—Collision regulations—Breach of regulations—Mouth-blown fog-horn—Necessary departure from regulations.*] In a collision upon the high seas between a British and a foreign ship, the provisions of sec. 419 of the *Merchant Shipping Act* 1894, sub-sec. (4), do not apply to the foreign vessel in the absence of an Order in Council made under the provision of either sec. 424 or 734 of the Act directing that the provisions of Part V. should apply to such foreign vessels. An Order in Council directing that the British Regulations for Prevention of Collisions at Sea should apply to ships of a foreign country does not of itself apply the provisions of Part V. of the *Merchant Shipping Act* 1894 to ships of that country, and the presumption of fault created by sec. 419, sub-sec. (4), for breach of one of such regulations does not attach to such foreign vessel. In a suit by a foreign ship against a British ship for damages for collision on the high seas the rule laid down in the *Fanny M. Carvill* ([1875] 13 App. Cas. 455 (*n.*)) and the *Duke of Buccleugh* ([1891] A.C. 310) that the presumption of culpability caused by a breach of the regulations may be met by proof that the

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SHIP AND SHIPPING—*continued.*

infringement could not by any possibility have contributed to the collision, and that the burden of showing this lies on the party guilty of the infringement (proof that the infringement did not in fact contribute to the collision being excluded) does not apply to such foreign ship where the country to which the ship belongs has merely adopted the British Regulations for Preventing Collisions at Sea without adopting the provisions of Part V. of the *Merchant Shipping Act* 1894. In such a case the ordinary maritime law of the Court will be applied, and proof that the breach of the regulations did not as a matter of fact contribute to the collision is admissible. If a mechanical fog-horn, which without negligence has become ineffective when used at sea, is provided for use on a ship to which the regulations apply, the user of the fog-horn by mouth in place of the mechanical means comes within the exception contained in sec. 419, sub-sec. (4), of the *Merchant Shipping Act* 1894, which permits a departure from the regulations under circumstances which make such departure necessary. Sub-sec. (4) of sec. 419 of the *Merchant Shipping Act* 1894 is not part of the *lex fori* of the Court; it does not concern procedure but goes to the substance of a party-litigant's rights. A ship under a coal charter whilst proceeding from her last port of call to her loading port to fulfil her charter was disabled in a collision with another ship, caused by the sole negligence of the latter. The injuries received obliged the chartered ship to return to port for repairs. The delay caused in effecting the repairs prevented her arrival at the port of loading until long after the arrival date fixed by the charter-party, and further caused her to lose her "turn" at the coal shoots at the port of loading, thus delaying her loading for 23 days. The charterer elected to proceed with his charter, notwithstanding the non-arrival of the ship at the loading port at the due date:—*Held*, in a suit for damages caused by the collision, that damages for the delay caused by the ship's loss of "turn" at the coal shoots cannot be recovered. OWNERS OF SAILING SHIP "FORTUNATO FIGARI" *v.* STEAMSHIP "COOGEE" 874

SHORTHAND NOTES — Costs — Charges for furnishing — Disallowance of — Chief Clerk—Proceedings before - 123
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SOLICITOR AND CLIENT — *Costs — Bill of costs—Right of client to demand bill of costs.*] A client is entitled as of right to ask for and obtain a bill of costs from his solicitor without any condition being attached to such delivery as to the bill being taxed. A solicitor, upon being asked by his client the amount of costs chargeable in respect of work done, informed him that the costs were about 40*l.*, and would

SOLICITOR AND CLIENT—*continued.*

probably tax at a higher sum, and said that if the client chose to pay a smaller sum, naming it, and would waive taxation, he would take such smaller sum in satisfaction. The client agreed to this, and paid the amount suggested. Some months afterwards, the relationship of solicitor and client having ceased, the client demanded the delivery of a bill of costs, and the solicitor said he would deliver one on condition that such bill were taxed and the difference paid. The client demanded the delivery of the bill unconditionally:—*Held*, that the client was entitled as of right to have a bill of costs delivered unconditionally. IN RE A. B.; EX PARTE DAVIES - - - 111

—— Charges for obtaining probate — "Property left"—Gross or net value—Costs of preparing statement - - 791
See PROBATE CHARGES ACT 1903.

—— Solicitor conducting own litigation — Profit costs - - - - - 536
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STAMPS—*Stamp duty—Settlement made under authority of will—Creation of new beneficial interests—Deed of settlement—Stamps Act* 1890 (*No.* 1140), *s.* 71—*Stamps Act* 1892 (*No.* 1274), *Schedule, Division VIII.*] A testator by his will bequeathed property to trustees upon trust for his daughters in equal shares, and declared that the share of each daughter who should be married at his death should be *by deed* settled upon her and her children, free from marital control, and in such a manner as his trustees should, in their discretion, think best, but so as not to deprive any daughter of the annual income thereof, with power to such daughter to appoint one-third of the capital as she might think fit, and in certain other events, which did not happen, to appoint the entire capital. The

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STAMPS—*continued.*

trustees by deed transferred to other trustees a daughter's share upon trust to pay the income thereof to such daughter for life, and after her death for "all the children or any the child of such daughter who being sons or a son shall attain the age of 21 years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares":—*Held*, that as there was a distinct creation or limitation of an interest by the deed, which did not exist before its execution, the instrument was a deed of settlement within the meaning of Division VIII. of the Schedule to the *Stamps Act* 1892, and was liable to stamp duty thereunder. The principle of *Wiseman* v. *The Collector of Imposts* ([1896] 21 V.L.R. 743) and *In re Austin* ([1901] 27 V.L.R. 408) applied. NEWMAN *v.* COLLECTOR OF IMPOSTS - 161

—— Act No. 1140 — Mortgage containing receipt of money—Admissibility in evidence for limited purpose - 610
See TRUSTEE. 2.

—— Mortgage containing acknowledgment of receipt of money — Stamp duty — Admissibility in evidence for limited purpose - - - - - - 399
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STREET BETTING—*Act* 1896 (*No.* 1436), *s.* 2 —*Betting in street — Evidence—Admissibility—Evidence of betting on previous occasion—Conduct showing purpose—"Undertaking to pay money"—Sufficiency of evidence.*] Upon a prosecution for being in a street for the purpose of betting, evidence was admitted of the accused having, a fortnight previously, made a bet in the same street, and of a conversation on that occasion as to being able to find him there between seven and eight o'clock in the evening:

STREET BETTING—*continued.*

—*Held*, that the evidence was properly received to show the purpose for which the accused was in the street—namely, the purpose of betting—and as negativing the suggestion of his being there for any other purpose. The principle of *The King* v. *Wyatt* ([1904] 1 K.B. 188) applied. In a prosecution under sec. 2 of the *Street Betting Suppression Act* 1896 the "undertaking to pay money" may be established without evidence of the meaning of all the terms of the wagering contract, as, *e.g.*, the amount of money the accused undertook to pay in the event of the horse which was backed winning. O'DONNELL *v.* BOLAND - - - - 655

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TRADE MARKS—*Passing off—Trade description—Different classes of goods of same manufacture and same quality—Use of word "patent" after patent has expired—Misrepresentation disentitling to relief — Damages—Injunction — Matters influencing discretion of Court to grant—Costs.*] The fact that the existence of any difference between two classes of an article, which the plaintiff makes and sells with different brands and at different prices, is doubtful, or that such difference, if it exists, is so trivial as not to be generally appreciable, is no answer to a claim for an injunction to restrain a defendant who has purchased the lower-priced article from the plaintiff from placing upon such article, without plaintiff's authority, the stamp or brand which the plaintiff puts only on the higher-priced article. The plaintiffs, a firm of manufacturers, manufactured and sold two brands of enemas at different prices. The higher-priced enema was branded "Patent No. 1474, Ingram & Son, London." The lower-priced enema (usually known as "The London") was issued and sold either unbranded or stamped "Patent Seamless Enemas; London; Manufacture Warranted," but did not bear either the plaintiffs' name or the number of the patent. The defendants, who were customers of the plaintiffs', and had purchased enemas of the cheaper class, branded them, in order to promote their sale, with a stamp containing plaintiffs' name, and similar in all respects to the stamp used by the plaintiffs on their higher-priced enemas, and sold them so branded. In an action for damages, and for an injunction to restrain the defendants from so doing, it was proved that the two brands of enemas were in all respects practically equal, that patent No. 1474 had long ago expired, and that the plaintiffs had assured the defendants that, with the exception of the brand, the higher and lower-priced were precisely the same:—*Held*, by A'BECKETT, J., that the plaintiffs were nevertheless entitled to an injunction restraining the defendants from affixing the stamp or mark complained of to any enemas which had not been so stamped by the plaintiffs. *Kirker, Greer & Co.* v. *Maynam* ([1901] 1 N.S.W. State Reports (Eq.) 73) approved and followed. Question of what misconduct on the part of a plaintiff will disentitle him to an injunction

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discussed. INGRAM & SONS *v.* THE INDIA RUBBER, GUTTA PERCHA, AND TELEGRAPH COMPANY LIMITED - - - - - - 172

2. —— *Passing off goods—Trade name or description—"Get up" common to the trade—Labels, etc., calculated to deceive.*] A person who commences to trade in goods properly bearing the same or practically the same trade name or description as the goods of another who has been using that trade name and description is under a special duty to actively guard by the get up, etc., of his goods against the possibility of their being mistaken or bought for the goods of that other. The plaintiff had for years bottled and sold a mineral water under the name of "Helidon Spa Water." The defendant commenced to bottle and sell similar water under the description "Spa Water from . . . . Helidon":—*Held* (reversing the decision of A'BECKETT, J.), that, even assuming that the defendant had the right to so describe its water, it came within the above rule, and was bound to employ labels, get up, etc., so dissimilar that there would be no possibility of its goods being mistaken for those of the plaintiff. HELIDON SPA WATER CO. *v.* HAMLYN SPA WATER CO. - - 182

3. —— *Trade Marks Act (No. 2) 1890 (No. 1183), ss. 17, etc.—Registration of trade mark—Right to oppose—"Words calculated to deceive"—Initial letters of words.*] Letters which are commonly used to denote words may be "words calculated to deceive" within the meaning of sec. 17 of the *Trade Marks Act* (No. 2) 1890. The letters "P & O." held to be "words" within the meaning of that section. The right to oppose the registration of a trade mark on the ground that it is calculated to deceive is not confined to persons who can show that they will be injured by the deception. *In re* FERGUSON AND COMPANY'S TRADE MARK 331

4. —— *Trade Marks Act* 1890 *No.* 2 (*Act No.* 1183), *s.* 8—*Trade mark—Essential particulars—Added matter—Disclaimer — Registration of letters as part of trade mark—Rectification of the register—Delay on part of applicant—Who may apply to have register rectified.*] Letters, words, or figures may be so used in combination with other matter as to form part of a distinctive device capable of being registered as a trade mark. Where they are so used they are not "added matter" and need not be disclaimed under sec. 8 (2) of the *Trade Marks Act* 1890 (No. 2). *In re Clement et Cie.'s Trade Mark* ([1900] 1 Ch. 114); and *In re Apollinaris Co.'s Trade Mark* ([1891] 2 Ch. 186) followed. *In re Hudson's Trade Marks* ([1886] 32 Ch. D. 311) and *In re Atkin's Trade Mark* (3 R.P.C. 164) not followed on this point. But where the device consists of letters, words, or figures merely colourably combined with other matter and it is clear from all the

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TRADE MARKS—*continued.*

circumstances that what is really intended to be registered is the part consisting of letters, words, or figures, the device is not "distinctive," and if registered as a trade mark the register will be rectified by its removal. The respondent, a corset manufacturer, was the registered proprietor in Victoria of a trade mark containing the letters W.B. The applicant, also a corset manufacturer, was the registered proprietor in England of a trade mark also containing the letters W.B., and was a rival of the respondent's in the corset trade of Victoria:—*Held*, that as the retention on the Victorian register of respondent's trade mark might lead people to suppose that it had the exclusive right to the use of the letters, although that would not be its legal effect, the applicant had sufficient interest to entitle him to apply for its removal from the register. *In re* Weingarten Brothers' Trade Mark 965

TRADES UNION — Combination to further own interests — Illegal act — Illegal conspiracy—Strike of workmen 475
See Action, Cause of.

TRANSFER OF LAND—*Transfer of Land Act* 1890—*Land Act* 1869, Part II.—Action for recovery of land—Adverse possession—Time running against the Crown - - - - - - 692
See Real Property Act 1890.

—— *Transfer of Land Act* 1890—Sale of land Production of certificate of title in vendor's name - - - - 374
See Vendor and Purchaser.

—— *Transfer of Land Act* 1890—Bare legal owner—Liability to land tax - 868
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TRANSFER OF LICENSED PREMISES—Second bar on licensed premises—Right of transferee to use second bar - 329
See Licensing. 2.

TRAVELLING EXPENSES — Expenses between several income-earning businesses—Travelling expenses of director of company - - - - - 298
See Income Tax. 2.

TRESPASS ON LAND—Grazing license—Sheep driven over land under—Notice—Interest in land - - - 641
See Land Act 1901.

TRIAL BY JURY—"Causes or matters within the cognizance of the Court in its equitable jurisdiction" — Fraud — Declaration in equity - - - - 293
See Practice. 9.

TRUSTEE—*Trustee—Breach of trust—Trustee following solicitor's advice—Negligence of trustee's solicitor—Liability of trustee—Payment by trustee to persons not entitled—Acquiescence by beneficiary in breach of trust—Right of beneficiary to sue—Jurisdiction of Court to relieve trustee from personal liability—"Acted reasonably"—Trusts Act* 1901 (*No.* 1769), *s.* 3—*Practice—Parties—Assignment of trust fund by way of mortgage—Accounts of money owing under mortgage—Representative of assignor's estate—Stamps Act* 1890 (*No.* 1140), *ss.* 59 (2), 68—*Mortgage containing acknowledgment of receipt of money—Stamp duty — Admissibility in evidence for limited purpose.*] An indenture of assignment by way of mortgage contained the following words:—"In consideration of the sum of 650*l.* the receipt whereof he doth hereby acknowledge the said mortgagor doth hereby assign, etc." The indenture was unstamped. Below the signature of the mortgagor to the indenture was a stamped receipt by him for the 650*l.*:—*Semble*, that the receipt in the body of the indenture required a stamp:—*But held* that the document was admissible in evidence as a mortgage, and for the purpose of showing that the mortgage was to secure a certain sum. In 1876 M. F. died intestate, having a vested interest in remainder in a trust fund of personalty, and leaving surviving her two children and her husband, J. F., who administered to her estate and became beneficially entitled to the whole of it. In 1891 J. F. assigned to the plaintiff, by way of mortgage, the whole of his interest in his wife's estate to secure the sum of 650*l.* with interest thereon at 20 per cent. In 1894 J. F. died intestate, and no representative of his estate was appointed. In 1897 the tenant for life of the trust fund died. In 1898 letters of administration of the estate of M. F., left unadministered by J. F., were granted to the defendant company, which was also one of the trustees of the fund. In 1899 the trustees of the fund, acting on the advice of their solicitors, paid two-thirds of the trust fund to the defendant company, as administrator *de bonis non* of M. F., by which it was divided between the two children of M. F., and paid the remaining one-third into Court, alleging that the validity of the assignment and the amount owing thereunder were in dispute. The plaintiff, believing at the time that it was entitled to one-third only of the fund, did not protest against the payments referred to of the other two-thirds. In an action for breach of trust against the trustees of the fund, or alternatively against the defendant company as administrators *de bonis non* of M. F., it was proved that a sum considerably greater than the whole of the trust fund was owing to the plaintiff under the mortgage:—*Held*, that the trustees of the fund were not liable for the payment to the defendant company as administrator *de bonis non*, as the latter was the proper person to receive the money, but that the latter was guilty of a breach of trust in the payment of the money to the children of M. F., and that the plaintiff was entitled to recover in respect to such breach of trust. It is no answer *per se* to a complaint

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TRUSTEE—*continued.*

for a breach of trust that the trustee has followed legal advice; and a trustee, though he may have followed legal advice, if he has acted in an unreasonable manner with regard to the beneficiary affected—as, for example, in giving away his property to other people—cannot be said to have "acted reasonably" within the meaning of sec. 3 of the *Trusts Act* 1901:—*Held*, that though the amount owing was in dispute, a representative of the estate of the assignor mortgagor was not a necessary party to the action:—*In re Bell* ([1896] 1 Ch. 1) and *Hockey* v. *Western* ([1898] 1 Ch. 350) distinguished. THE GENERAL FINANCE AGENCY AND GUARANTEE CO. OF AUSTRALIA LTD. *v.* THE NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALIA LTD. - - - - - - **399**

2. —— *Breach of trust—Trustee following solicitor's advice—Negligence of trustee's solicitor—Payment by trustee to persons not entitled—Liability of trustee—Jurisdiction of Court to relieve trustee from personal liability—"Acted reasonably"—"Ought fairly to be excused"—Trusts Act* 1901 (*No.* 1769), *s.* 3—*Practice—Parties—Assignment of trust fund by way of mortgage — Accounts of money owing under mortgage—Representative of assignor's estate—Joinder of parties to whom defendant trustee asserts that trust fund was wrongfully paid by him—Stamps Act* 1890 (*No.* 1140), *ss.* 59 (2), 68—*Mortgage containing acknowledgment of receipt of money—Stamp duty—Admissibility in evidence for limited purposes.*] In 1876 M. F. died intestate, having a vested interest in remainder in a trust fund of personalty, and leaving surviving her two children and her husband, J. F., who administered to her estate and became beneficially entitled to the whole of such interest. In 1891 J. F. assigned to the plaintiff, by way of mortgage (*inter alia*), the whole of his interest in his wife's estate to secure the sum of 650*l.* with interest thereon at 20 per cent., and notice of this assignment was given to the trustees of the fund. In 1894 J. F. died intestate, and no representative of his estate was appointed. In 1897 the tenant for life of the trust fund died. In 1898 letters of administration of the estate of M. F., left unadministered by J. F., were granted to the defendant company, which was also one of the trustees of the fund. In 1899 the trustees of the fund paid one-third of the trust fund into Court, alleging that the validity of the assignment and the amount owing thereunder were in dispute, and paid the remaining two-thirds to the defendant company, as administrator *de bonis non* of M. F. The plaintiff claimed this latter sum as against such trustees or alternatively as against the defendant company as such administrator. In its defence the defendant company pleaded that the moneys received by it were, under the advice of solicitors,

TRUSTEE—*continued.*

paid to the two children of J. F. and M. F. It was proved that a sum considerably greater than the whole of the trust fund was owing to the plaintiff under the mortgage:—*Held* that, as there was no possibility of there being a surplus of the trust fund over the amount of the debt owing to the plaintiff under the mortgage, there was no necessity for an account to be taken as to how much was owing to him by the mortgagor, and no necessity for a representative of the estate of the mortgagor to be joined as a party:—*Held also*, that the two children of J. F. and M. F. were not necessary parties to the claims made by the plaintiff, and that, if they became necessary parties by virtue of the defence raised, the defendant ought to have applied to have them added:—*Held also*, that the plaintiff was entitled to recover the money claimed against the defendant company as such administrator. In order that a trustee may be relieved under sec. 3 of the *Trusts Act* 1901 from personal liability for a breach of trust, it is not sufficient for him to satisfy the Court that he has acted both honestly and reasonably; but he must also satisfy the Court that in all the circumstances he ought fairly to be excused. Where a trustee has acted both honestly and reasonably, but has committed a breach of trust, and, after knowledge thereof, allows time to pass on, circumstances to change, and the trust estate to lose in respect of such breach of trust through want of action on his part, he ought not to be relieved under sec. 3 of the *Trusts Act* 1901 from personal liability for such breach of trust. An indenture of assignment by way of mortgage contained the following words:—"In consideration of the sum of 650*l.* the receipt whereof he doth hereby acknowledge the said mortgagor doth hereby assign etc." The indenture was unstamped. Below the signature of the mortgagor to the indenture was a stamped receipt by him for the 650*l.*:—*Quære*, whether the receipt in the body of the indenture required a stamp:—*Held*, that the document was admissible in evidence as a mortgage, and for the purpose of showing that the mortgage was to secure a certain sum. The decision of A'Beckett, J., *supra*, at p. 399 *et seq.*, affirmed. THE GENERAL FINANCE AGENCY AND GUARANTEE COMPANY OF AUSTRALIA LIMITED *v.* THE NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALIA LIMITED - - **610**

—— Direction to sell realty—Duty of trustee—Power to postpone sale or lease—Originating summons — Practice — Infants - - - - - - **793**
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—— Trustees under deed of assignment—Subsequent insolvency of assignor—Commission to trustees—Costs - - **797**
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TRUSTEES UNDER ENGLISH BANKRUPTCY—Right to sue in Victoria—Debentures—Goods and chattels 102
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TRUSTS ACT 1901—Breach of trust—"Acted reasonably" — Advice of solicitor—Breach of trust - - - - 399
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——— Breach of trust—Relief of trustee—Trustee following solicitor's advice 610
See TRUSTEE. 2.

USE AND OCCUPATION — Action for—County Court — Special summons—Liquidated demand—Practice - 830
See COUNTY COURT. 2.

VACCINATION—Failure to have child vaccinated—Officer—Defence—Certificate of vaccination after information lodged
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VALUATION — Municipality — Rates — Abandonment of valuation - - 62
See SEWERS RATES.

—— Municipal—Valuation in force—Condition precedent to liability—Rating - 289
See SEWERS RATES. 2.

VEGETATION DISEASES ACT 1896—*No.* 1432, *ss.* 2, 17—*Vegetation Diseases Act* 1901 (*No.* 1773), *ss.* 2, 3—*Exposing for sale diseased vegetables—Inspector appointed to "carry into effect the provisions of the Act"—Authority to prosecute—Informer—Right to prosecute for an offence against an Act for public protection—"Disease" within meaning of Vegetation Diseases Acts—Proclamation in Government Gazette of 3rd December* 1902—*Validity of proclamation.*] *Semble*, an inspector appointed under sec. 17 of the *Vegetation Diseases Act* 1896 "to carry into effect the provisions of this Act" is thereby empowered to prosecute offenders against that Act or the Act No. 1773 amending it. The said Acts being for the protection of the public at large, any person may prosecute for an offence against them. *Sargood* v. *Veale* ([1891] 17 V.L.R. 660) applied. In pursuance of the powers conferred on the Governor in Council by the *Vegetation Diseases Act* 1896 to proclaim any disease to be a disease under the Act, a proclamation of 3rd December 1902 was issued declaring "every abnormal condition of or in any tree plant or vegetable . . . . whether consisting of the presence of or caused by or due to the operations development growth or decay of any insect," etc., to be a disease:—*Held*, that the proclamation, though if read literally it might be *ultra vires*, was to be construed in connection with the Act, and was valid. TURNER *v.* SYKES - - - - 18

VENDOR AND PURCHASER—*Contract for sale of land—Transfer of Land Act* 1890 (*No.* 1149) — *Production of certificate of title in vendor's name.*] Where, in a contract for the sale of land under the *Transfer of Land Act* 1890, reference is made to certificates of title for the said land, and the conditions of Schedule 25 of the Act are made applicable to the contract, the vendor makes full compliance with the terms of the contract by producing the certificates of title referred to although they are not in his own name. Where a vendor sells land under the *Transfer of Land Act* he is entitled to a reasonable time within which to produce a certificate of title in his own name, and the purchaser is not entitled to rescind the contract by reason only that at the time of the sale the certificate of title was not in the vendor's own name. The case of *Stoddart* v. *Woods* ([1889] 15 V.L.R. 457), in so far as it purports to lay down the general rule that a vendor is bound to produce a certificate of title in his own name when called upon to do so, overruled. FORBES *v.* BUTLER - - 374

2. —— *Contract for sale of land—Payment by instalments—Time the essence of the contract—Partial failure to perform—Right to rescind—"Stipulation" and "condition" — Condition precedent.*] The breach by one party of one of the conditions of a contract, although a time is fixed for its performance, and although the contract provides that time shall be of the essence of the contract, does not of itself justify the other party in treating the contract as at an end. To justify one party in considering the contract has been entirely determined by the breach of a condition, the party guilty of the breach must have shown by his conduct an intention to repudiate, and the existence of that intention must be tested by an examination of all the circumstances of the case. Where a contract for the sale of land provided for the payment of the purchase money in yearly instalments, and it was further provided that time should be of the essence of the contract:—*Held*, that the failure to pay one instalment upon the fixed day was not in itself conclusive of the intention of the purchaser to repudiate. MORONEY *v.* ROUGHAN - - - - 541

VERMIN DESTRUCTION ACTS—1890 (*No.* 1153), *ss.* 4, 7, 14, 15; 1901 (*No.* 1770), *s.* 4—*Owner or occupier of "lands" — Whether "lands" include "roads"—Liability of municipality to destroy vermin on roads.*] There is no duty cast upon municipalities by the *Vermin Destruction Acts* to keep its roads, culverts, &c., within the municipal district free from vermin:—*Semble*, the duty is thrown upon the owners or occupiers of the property adjoining the road in the case of private property, or the Board of Land and Works where there is no private owner or occupier of the adjoining land. TREGANOWAN *v.* SHIRE OF MINHAMITE - 690

VOLUNTARY SETTLEMENT — Trusts to take effect on death of settlor—Duty on estates of deceased persons - 82
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VOLUNTARY SETTLEMENT—*continued.*

—— Trusts to take effect during life of settlor —Duty on estates of deceased persons [89 (*n.*)

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WARD OF DEPARTMENT FOR NEGLECTED CHILDREN — Power to demand back child boarded out 685

See NEGLECTED CHILDREN'S ACT 1890.

WARDEN—Jurisdiction of—Order for inspection of mine—Jurisdiction to make second order - - - - 683

See MINES ACT 1890.

WATER — *Natural flow of surface water—Servitude of lower land—Obstruction of flow of water by owner of lower land—Alteration of natural features of land — Concentration of water on to lower land—Leave and licence—Licensee of Crown lands, power of, to create an easement.*] The owner of land on a lower level has no right to obstruct the natural and accustomed course of the superabundant water flowing from and out of a well-defined watercourse, so as to throw such waters back on to the land on the higher level, to the damage of the owner of such higher land:—*So held* by WILLIAMS and HODGES, JJ. (A'BECKETT, J., dissenting):—*Per* HODGES, J. The same rule is applicable where the flow of water is ordinary natural surface water. But where the natural features of the land have been so altered by drains constructed by a municipal authority, and drainage and other work done by or under the supervision of the owner of the land on the higher level, or by his predecessor in title, and such alteration has concentrated the flow of water beyond its ordinary natural dimensions on to the lower land, the owner of such lower land may protect himself by damming back such concentrated flow on to the higher land:—*So held* by the Full Court (WILLIAMS, A'BECKETT, and HODGES, JJ.), reversing the judgment of Madden, C.J. (28 V.L.R. 144). A licensee of Crown lands may by leave and licence given to the owner of adjoining land exclude himself or his successor in title from claiming a right to the continuance of the natural flow of water from his land over such adjoining land:—*So held* by WILLIAMS and HODGES, JJ., reversing the judgment of Madden, C.J. ([1902] 28 V.L.R. 144). VINNICOMBE *v.* MACGREGOR - - - - 32

2. —— *Watercourse — Riparian owners — Rights of riparian owners—Obstructions in the alveus of a stream—Dam erected by riparian owner for the purpose of irrigation—Weir erected by riparian owner at bed level to prevent the erosion of the bed—Obstruction causing no appreciable damage—Right to nominal damages —Right to injunction—Right to preserve the bed of a stream from the operations of nature—*

WATER—*continued.*

Title ad medium filum fluminis—Trespass.] A dam erected by the defendant across a stream from his land and on to the lower end of the plaintiff's land obstructed the flow of the stream sufficiently to enable the defendant to irrigate his land, but it did no appreciable damage to the plaintiff. A municipal corporation constructed an artificial channel, the effect of which was to concentrate the waters of a stream and to erode its bed. The defendant, in order to prevent this erosion spreading up stream between his land and that of the plaintiff, constructed a weir across the stream on a level with the bed, and lower down the stream than the above-mentioned dam. The weir did not obstruct the natural flow of the stream, but it arrested or retarded the erosion of the bed:—*Held*, that, apart from any question of trespass, both the dam and the weir were lawful, and that the plaintiff was not entitled either to nominal damages or to an injunction for their removal and discontinuance. If the *alveus* of a stream is being destroyed by the operations of nature, riparian proprietors may for their own benefit and protection preserve the course of the stream as it was by mending or maintaining its banks and bottom:—*Quære*, whether the title to the bed of a river *ad medium filum aquæ* is in riparian owners in severalty. The rights of riparian owners discussed. *Bickett* v. *Morris* ([1866] L.R. 1 H.L. (Sc.) 47) discussed. NAGLE *v.* MILLER - 765

WATER ACTS—1890 (*No.* 1156), *ss.* 458, 483—*Water Act* 1900 (*No.* 1651), *s.* 153—*Water rates, liability to pay—Refusal to supply water—Demand for payment of rates, sufficiency of.*] Under sec. 458 of the *Water Act* 1890 upon the fulfilment of certain conditions the owner of property is liable to pay water rates "unless the Board refuse to supply" him with water. Under that provision, where the Board has cut off the water from such an owner for the non-payment of prior water rates this would amount to a refusal to supply, and such person would not be liable for water rates during such period under the above-mentioned act. By the *Water Act* 1900, sec. 153, power is given to the Board to cut off the water supply for non-payment of rates, and such "cutting off" is not a refusal to supply the owner of the property with water:—*Held*, that the provisions of sec. 153 are not retrospective and that where the Board has cut off the supply prior to the passing of the Act of 1900 the owner is not liable until and unless he has been again supplied with water and the Board has cut off the supply afterwards:—*Semble*, a demand for payment of rates due for several years made first before action brought to recover rates is sufficient under sec. 483 of the *Water Act* 1890, although no demand was made from time to time as each rate became due. MAYOR, ETC., OF ARARAT *v.* MARTIN 835

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WILL — *Construction — Trustee — Direction to sell realty—Duty—Power to postpone sale or to lease—Practice—Originating summons—Infant —Representation.*] A testator declared that upon the happening of certain events his trustees should with all convenient speed absolutely sell and dispose of his real estate or such part thereof as should be then unsold :—*Held*, that although the words "with all convenient speed" gave the trustees a certain discretion to postpone the sale, if in doing so their conduct was afterwards challenged by any beneficiary it would lie upon them to show that the interests of such beneficiary had not been injured by the delay :—*Held also*, that in such a case the trustees ought, as far as possible, to keep their discretion open and unfettered. Upon a summons asking the Court to determine, in the interests of infants beneficiaries, whether something should be done or forborne, the infants should be brought before the Court personally. *The National Trustees Executors and Agency Co. Ltd.* v. *Johnson* ([1892] 18 V.L.R. 386) distinguished. In re King; King v. Berndt. [793

2. —— *Gift to widow for the benefit of herself and children — Trust — Precatory trust.*] A testator devised and bequeathed all his real and personal estate unto his wife to hold the same unto her for her life for the benefit of herself and their children, and at her death to be divided equally among such of their children as should then be living :—*Held*, that the widow held the property in trust for herself and the children, and that during her lifetime the widow and children were equally and jointly entitled to the income thereof. *Huggard* v. *Huggard* ([1901] 7 A.L.R. 139) distinguished. In the Will of Smith - 932

3. —— *Life tenant — Licensed premises— Licence of hotel—Repairs.*] A testator by his will directed his executor to pay to or permit his wife to receive the rents and profits of or to otherwise enjoy his real estate for her life, with power to the executor, with the consent of the wife, to lease the real estate. The rents and profits were to go to two sons of the testator after the death of the wife, and upon the death of the surviving son the executor was directed to sell the real estate and to pay the proceeds to the Alfred Hospital. The testator was at the time of his death a licensed victualler, and carried on such business at the hotel on his real estate, which consisted of one block. After his death his widow continued to carry on the business of a licensed victualler in the same premises. Questions having arisen as to the administration of the estate :—*Held*, that it was the intention of the testator that the premises should be continued as licensed premises, and that the widow was under an obligation, so long as she continued in occupation, to keep up the license, and fulfil the requirements of the *Licensing Act* 1890, or else she should withdraw from occupation, and

WILL—*continued.*

allow the trustee to lease the premises as licensed premises :—*Held also*, that the trustee, in the event of the widow withdrawing from the occupation of the premises, was under an obligation to keep up the premises as a going concern, and to preserve the licence. The licence is attached to the premises, and so long as the hotel was carried on by the widow it belongs to her solely, but upon her withdrawal from occupation, it, being attached to the premises, goes to the trustee, and ultimately to the remaindermen. A tenant for life of licensed premises is entitled to be recouped out of *corpus* for moneys expended in improvements to the building which are of a permanent nature, but ordinary repairs must be made by the tenant for life at her own expense. Abbott v. Morris [166

4. —— *Parent and child — Rule against double portions—Ademption of devise of land by subsequent gift inter vivos—Advancement— Wills Act* 1890 (*No.* 1159).] The rule in cases of satisfaction of a portion of a legacy, that the thing given in satisfaction must be *ejusdem generis* with the thing in lieu of which it is given, applies equally to the case of ademption of a legacy by a subsequent gift *inter vivos*. Where a person is entitled under a will to two funds, either of which may be taken to have been ademed by a subsequent gift *inter vivos*, the ademption will take effect only on that fund which the subsequent gift more nearly resembles. A testator by his will—(*a*) devised his estate of Whiteacre to his eldest son for life with remainder to the children of such son ; (*b*) devised certain lands in the counties of X. and Y. to trustees to be sold, the proceeds to be divided amongst his children 15 years after his death, or on the youngest attaining 21, the trustees being authorized at their discretion to allot shares instead of selling ; both sons and daughters took absolute interests in these lands ; (*c*) directed the residue of his estate to be divided between his children, the daughters being given inalienable life interests with remainders to their children. Subsequently to the making of his will testator sold part of his estate of Blackacre in the county of Z. for 17,000*l.*, and after the sale he in consideration of natural love and affection transferred the unsold portion (which was worth about the same amount), together with stock, plant, etc., to the value of about 1000*l.*, to his eldest son. The following year testator in consideration of his affection for his five daughters transferred to trustees for his five daughters inscribed stock to the value of 17,500*l.*, giving the daughters protected life interests therein with remainders to their children practically in the same way as that in which their shares in the residuary estate had been given :—*Held* : (*a*) That the devise of Whiteacre was not ademed or otherwise affected by the subsequent gift of Blackacre

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WILL—*continued.*

to the eldest son. (*b*) That the devise of lands in the counties of X. and Y. was not adeemed or otherwise affected by the subsequent gift of Blackacre to the eldest son nor by the settlement of the inscribed stock in favour of testator's daughters. (*c*) That none of the daughters was entitled to share in the residuary estate without bringing her share in the settlement of inscribed stock into hotchpot. IN RE CHIRNSIDE. EMMERTON *v.* CHIRNSIDE [4

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—— "Land of any other person" (Driving Sheep) - - - - - - 641
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